Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules Related to Retransmission Consent	)	MB Docket No. 10-71
	)	

REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

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By the Commission: Chairman Wheeler and Commissioners Clyburn, Rosenworcel, Pai and O'Rielly issuing separate statements.

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I. INTRODUCTION

1. In this Report and Order ("*Order*"), we revise our "retransmission consent" rules, which govern carriage negotiations between broadcast television stations and multichannel video programming distributors ("MVPDs"),[1] to provide that joint negotiation by stations that are ranked among the top four stations in a market as measured by audience share ("Top Four" stations) and are not commonly owned constitutes a violation of the statutory duty to negotiate retransmission consent in good faith.[2] In March 2010, 14 MVPDs and public interest groups filed a rulemaking petition arguing that changes in the marketplace, and the increasingly contentious nature of retransmission consent negotiations, justify revisions to the Commission's rules governing retransmission consent.[3] The Commission initiated this proceeding[4] and a robust record developed. Our action today addresses MVPDs' argument that competing broadcast television stations ("broadcast stations" or "stations") obtain undue bargaining leverage by negotiating together when they are not commonly owned. It is our intention that this action will facilitate the fair and effective completion of retransmission consent negotiations.[5] In addition, in the *Further Notice of Proposed Rulemaking* ("*FNPRM*"), we seek comment on whether to modify or eliminate the Commission's network non-duplication and syndicated exclusivity rules in light of changes in the video marketplace since these rules were first adopted more than forty years ago.[6]

II. BACKGROUND

2. Congress created the retransmission consent regime in 1992. It stated that it intended "to establish a marketplace for the disposition of the rights to retransmit broadcast signals," but not "to dictate the outcome of the ensuing marketplace negotiations."[7] In recent years, the marketplace has changed in

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[1] The Communications Act of 1934, as amended (the "Act"), prohibits MVPDs from retransmitting a broadcast television station's signal without the station's consent. 47 U.S.C. § 325(b)(1)(A).

[2] *See infra* Section III. The statutory duty to negotiate retransmission consent in good faith applies to both broadcasters and MVPDs. *See* 47 U.S.C. § 325(b)(3)(C).

[3] Time Warner Cable Inc. *et al.* Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent, MB Docket No. 10-71 (filed Mar. 9, 2010) (the "Petition"). Petitioners include: American Cable Association; Bright House Networks, LLC; Cablevision Systems Corp.; Charter Communications, Inc.; DIRECTV, Inc.; DISH Network LLC; Insight Communications Company, Inc.; Mediacom Communications Corp.; New America Foundation; OPASTCO; Public Knowledge; Suddenlink Communications; Time Warner Cable Inc.; and Verizon. The Media Bureau sought comment on the Petition. *See Media Bureau Seeks Comment on a Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent,* Public Notice, 25 FCC Rcd 3334 (MB, 2010) ("*PN*").

[4] *Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718 (2011) ("*NPRM*").

[5] The *NPRM* sought comment on additional issues related to retransmission consent, including strengthening the *per se* good faith negotiation standards in other specific ways, clarifying the totality of the circumstances good faith negotiation standard, revising the notice requirements related to dropping carriage of a television station, and application of the sweeps prohibition to retransmission consent disputes. *See NPRM*, 26 FCC Rcd at 2727-40, ¶¶ 17-41. This *Order* addresses only joint negotiation, and the *FNPRM* addresses the exclusivity rules, and the record remains open on the other issues discussed in the *NPRM*. *See infra* n. 46. We realize that the views of both broadcasters and MVPDs may have evolved since we last sought comment in 2011 and they are free to provide additional comment on the remaining issues to the extent they so desire.

[6] *See infra* Section IV.

[7] *See* S. Rep. No. 92, 102nd Cong., 1st Sess. (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1169.

two significant ways. First, broadcasters have increasingly sought and received monetary compensation in exchange for retransmission consent.[8] Second, while consumers seeking to purchase video programming service typically formerly had only one option – a cable operator – today consumers may choose among several MVPDs. In addition to MVPD services, today's consumers also access video programming on the Internet.[9] Against this backdrop, the petitioners filed the Petition, asking the Commission to impose mandatory interim carriage while retransmission consent disputes are pending, and to impose dispute resolution mechanisms.[10] After stating that the Commission did "not believe that [it has] authority to require either interim carriage requirements or mandatory binding dispute resolution procedures" in light of "the statutory mandate in Section 325 and the restrictions imposed by the [Administrative Dispute Resolution Act]," the *NPRM* sought comment "on other ways the Commission can protect the public from, and decrease the frequency of, retransmission consent negotiation impasses within [its] existing statutory authority."[11]

3. Section 325 of the Act prohibits broadcast television stations and MVPDs from "failing to negotiate [retransmission consent] in good faith," and it provides that entering "into retransmission consent agreements containing different terms and conditions, including price terms" is not a violation of the duty to negotiate in good faith "if such different terms and conditions are based on competitive marketplace considerations."[12] Beginning in 2000, the Commission implemented the good faith negotiation statutory provisions through a two-part framework for determining whether retransmission consent negotiations are conducted in good faith.[13] First, the Commission established a list of seven objective good faith negotiation standards, the violation of which is considered a *per se* breach of the good faith negotiation obligation.[14] Second, even if the seven specific standards are met, the Commission

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[8] *See* Petition at 5.

[9] *See id.* at 4-5. *See also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fifteenth Report, 28 FCC Rcd 10496, 10502, n. 12 (2013) ("*2013 Competition Report*") (noting "the historical development of delivered video where consumers initially had access to over-the-air broadcast television, then a growing number of MVPDs, and most recently the Internet").

[10] Petition at 31-40.

[11] *NPRM*, 26 FCC Rcd at 2729, ¶ 19. The *NPRM* also provided extensive background information on retransmission consent, good faith negotiations, the Petition, and the consumer impact, which we need not repeat here. *See id.* at 2720-27, ¶¶ 4-16.

[12] 47 U.S.C. § 325(b)(3)(C). In 1999, Congress enacted the Satellite Home Viewer Improvement Act ("SHVIA"), which required television stations to negotiate retransmission consent with MVPDs in good faith and included the "competitive marketplace considerations" provision. Pub. L. No. 106-113, 113 Stat. 1501 (1999). Although SHVIA only imposed the good faith negotiation obligation on broadcasters, in 2004 Congress made the good faith negotiation obligation reciprocal between broadcasters and MVPDs. Pub. L. No. 108-447, 118 Stat. 2809 (2004) (referred to as the Satellite Home Viewer Extension and Reauthorization Act ("SHVERA")).

[13] *See Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445 (2000) ("*Good Faith Order*").

[14] 47 C.F.R. § 76.65(b)(1) ("The following actions or practices violate a broadcast television station's or multichannel video programming distributor's (the 'Negotiating Entity') duty to negotiate retransmission consent agreements in good faith: (i) Refusal by a Negotiating Entity to negotiate retransmission consent; (ii) Refusal by a Negotiating Entity to designate a representative with authority to make binding representations on retransmission consent; (iii) Refusal by a Negotiating Entity to meet and negotiate retransmission consent at reasonable times and locations, or acting in a manner that unreasonably delays retransmission consent negotiations; (iv) Refusal by a Negotiating Entity to put forth more than a single, unilateral proposal; (v) Failure of a Negotiating Entity to respond to a retransmission consent proposal of the other party, including the reasons for the rejection of any such proposal; (vi) Execution by a Negotiating Entity of an agreement with any party, a term or condition of which, requires that such Negotiating Entity not enter into a retransmission consent agreement with any other television broadcast station or multichannel video programming distributor; and (vii) Refusal by a Negotiating Entity to execute a written

(continued….)

may consider whether, based on the totality of the circumstances, a party failed to negotiate retransmission consent in good faith.[15]

4. In the *NPRM*, the Commission sought comment on potential revisions to the Commission's framework for evaluating whether parties negotiate retransmission consent in good faith.[16] Specifically, the Commission sought comment on several specific ways it could strengthen the good faith negotiation requirement, including "whether it should be a *per se* violation for a station to grant another station or station group the right to negotiate or the power to approve its retransmission consent agreement when the stations are not commonly owned."[17] The Commission's goal was to identify ways to "increase certainty in the marketplace, thereby promoting the successful completion of retransmission consent negotiations and protecting consumers from impasses or near impasses."[18]

5. In addition, the *NPRM* sought comment on the potential benefits and harms of eliminating the Commission's rules concerning network non-duplication and syndicated programming exclusivity.[19] When a network provides a station with exclusive rights to the network's programming within a certain geographic area, the Commission's network non-duplication rules permit the station to assert those rights through certain notification procedures.[20] In such circumstances, the rules permit a station to assert its contractual rights to network exclusivity within a specific geographic zone to prevent a cable system from carrying the same network programming aired by another station.[21] Similarly, the syndicated exclusivity rules permit a station to assert its contractual rights to exclusivity within a specific geographic zone to prevent a cable system from carrying the same syndicated programming aired by another station.[22] We refer to the network non-duplication and syndicated exclusivity rules collectively as the "exclusivity rules."[23]

III. DISCUSSION

6. We amend our rules to provide that it is a violation of the Section 325(b)(3)(C)(ii) duty to negotiate in good faith for a television broadcast station that is ranked among the top four stations as

(Continued from previous page)
retransmission consent agreement that sets forth the full understanding of the television broadcast station and the multichannel video programming distributor.").

[15] *See* 47 C.F.R. § 76.65(b)(2) ("In addition to the standards set forth in § 76.65(b)(1), a Negotiating Entity may demonstrate, based on the totality of the circumstances of a particular retransmission consent negotiation, that a television broadcast station or multichannel video programming distributor breached its duty to negotiate in good faith as set forth in § 76.65(a).").

[16] *NPRM*, 26 FCC Rcd at 2729-37, ¶¶ 20-33.

[17] *Id.* at 2731, ¶ 23.

[18] *Id.* at 2730, ¶ 21.

[19] *Id.* at 2740-43, ¶¶ 42-45.

[20] *See* 47 C.F.R. § 76.92 *et seq.*

[21] *See id.* The Commission's rules limit the geographic zone based upon the size of the market in which the station is located.

[22] *See* 47 C.F.R. § 76.101 *et seq.*

[23] In the year 2000, the Commission adopted rules implementing provisions of SHVIA that applied the network non-duplication and syndicated exclusivity rules to DBS providers only in limited situations that are not equivalent to the broader application of the exclusivity rules to cable systems. *See Implementation of the Satellite Home Viewer Improvement Act of 1999: Application of Network Non-Duplication, Syndicated Exclusivity, and Sports Blackout Rules to Satellite Retransmissions of Broadcast Signals*, Report and Order, 15 FCC Rcd 21688 (2000) ("*Satellite Exclusivity Order*"), *recon. granted in part, denied in part*, Order on Reconsideration, 17 FCC Rcd 27875 (2002). In the 2010 Petition, petitioners argued that the network non-duplication and syndicated exclusivity rules provide broadcasters with a "one-sided level of protection" that is no longer justified. Petition at 12-15.

measured by audience share to negotiate retransmission consent jointly with another such station, if the stations are not commonly owned[24] and serve the same geographic market ("joint negotiation"). We conclude that adopting a prohibition on joint negotiation is authorized by Section 325 of the Act and serves the public interest by promoting competition among Top Four broadcast stations for MVPD carriage of their signals and the associated retransmission consent revenues. For the purpose of applying this rule, we further: (i) define "joint negotiation" to encompass specified coordinated activities related to negotiation for retransmission consent between or among Top Four stations; (ii) confirm that stations that are deemed to be "commonly owned" based on the Commission's attribution rules are permitted to negotiate jointly; (iii) deem that Top Four stations that are licensed to operate in the same Designated Market Area ("DMA")[25] serve the same geographic market; and (iv) define Top Four stations consistently with how we define such stations in our local television ownership rule. In addition, we conclude that stations subject to this rule are prohibited from engaging in joint negotiation as of the effective date of rules we adopt in this *Order*, regardless of whether they are subject to existing agreements, formal or informal, obligating them to negotiate retransmission consent jointly.[26]

7. The record in this proceeding reflects divergent views about whether a rule prohibiting joint negotiation advances the public interest. In general, parties supporting such a rule, principally MVPDs and consumer groups, assert that joint negotiation enables broadcast stations to charge supra-competitive retransmission consent fees to MVPDs which, in turn, are passed along to consumers in the form of higher rates for MVPD services.[27] ACA argues that joint negotiation harms consumers in additional ways, such as by heightening the disruption caused by negotiating breakdowns and depleting capital that MVPDs otherwise could use to deploy broadband and other advanced services.[28] Proponents of a prohibition also claim that joint negotiation is a widespread and growing industry practice that

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[24] We use the phrases "separately owned" and "not commonly owned" interchangeably in referring to television broadcast stations that are subject to the prohibition on joint negotiation we adopt in this *Order*. For ease of reference, we use these terms to refer to Top Four stations that are not commonly owned, operated, or controlled under the Commission's attribution rules. *See* 47 C.F.R. § 73.3555 Notes.

[25] A DMA is a local television market area designated by Nielsen Media Research. There are 210 DMAs in the United States. *See* www.nielsenmedia.com (visited on January 14, 2014).

[26] As noted *infra,* the rule does not apply to joint negotiation by same market, separately owned Top Four stations that has been completed prior to the effective date of the rules, and it does not invalidate retransmission consent agreements concluded through such negotiation. *See infra* ¶ 34.

[27] *See* Comments of the American Cable Association at 5-8 ("ACA Comments"); Comments of the American Public Power Association *et al.* at 11, 22 ("APPA Group Comments"); Comments of Cablevision Systems Corporation at 20-22 ("Cablevision Comments"); Comments of CenturyLink at 5 ("CenturyLink Comments"); Comments of DIRECTV, Inc. at 19-20 ("DIRECTV Comments"); Comments of Mediacom Communications Corporation *et al.* at 19-22 ("Mediacom *et al.* Comments"); Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies *et al.* at 11-12 ("OPASTCO *et al.* Comments"); Comments of Public Knowledge and New America Foundation at 8 ("PK/NAF Comments"); Comments of Time Warner Cable Inc. at 35-37 ("TWC Comments"); Comments of the United States Telecom Association at 27-28 ("US Telecom Comments"); Reply Comments of the American Cable Association at 2-42 ("ACA Reply"); Reply Comments of the American Public Power Association *et al.* at 19-20 ("APPA Group Reply"); Reply Comments of Media Access Project at 1-2 ("MAP Reply"); Reply Comments of Mediacom Communications Corporation *et al.* at 6-8 ("Mediacom *et al.* Reply"); Reply Comments of Time Warner Cable Inc. at 28-30 ("TWC Reply").

[28] *See* ACA Comments at 14-17. Although ACA supports a prohibition on joint negotiation in general, its advocacy in this proceeding is principally focused on joint negotiation by separately owned Top Four stations that serve the same market.

warrants immediate remedial action,[29] and that the Commission is empowered under Section 325 of the Act and its legislative history to bar joint negotiation to stem further harm to consumers.[30]

8. Parties opposing a rule barring joint negotiation, principally broadcasters, generally argue that there is no sound legal or policy basis for prohibiting joint negotiation,[31] and that doing so is beyond the Commission's statutory authority, inconsistent with congressional intent, and contrary to Commission precedent.[32] In addition, parties opposing a joint negotiation prohibition argue that joint negotiation enhances efficiency and reduces transaction costs, thereby facilitating agreements and resulting in lower retransmission consent rates.[33] These parties also contend, among other things, that: (i) joint negotiation does not give broadcast stations undue negotiating leverage relative to MVPDs, which do have such leverage, and in fact helps small broadcasters to reduce their operating costs and devote more resources to local programming;[34] (ii) a prohibition on joint negotiation would arbitrarily inflict greater harm on some broadcasters based on spectrum allocation and market size;[35] (iii) barring joint negotiation by broadcasters while allowing MVPDs to coordinate their negotiations would be inconsistent and inequitable;[36] (iv) a rule proscribing joint negotiation is unnecessary because joint negotiation does not result in negotiating delays or other complications;[37] and (v) joint negotiation does not equate to collusive or anticompetitive conduct, and antitrust law is better suited to address any such concerns.[38] In the paragraphs below, we discuss the need for the prohibition on joint negotiation that we adopt today and then discuss the various elements of the rule. In so doing, we explain why we reject the above assertions.

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[29] *See* ACA Comments at 7; ACA Reply at 33-35; Letter from Stacy Fuller, Vice President of Regulatory Affairs for DIRECTV, to Marlene H. Dortch, Secretary, FCC, at Attachment (Dec. 6, 2013) ("DIRECTV Dec. 6, 2013 *Ex Parte* Letter and Attachment").

[30] *See* ACA Reply at 5-17.

[31] *See* Comments of Belo Corp. at 23 ("Belo Comments"); Comments of the CBS Television Network Affiliates Association at 19-20 ("CBS Affiliates Comments"); Comments of Barrington Broadcasting Group, LLC *et al.* at 20-22 ("Joint Broadcasters Comments"); Comments of LIN Television Corporation at ii, 18-20 ("LIN Comments"); Comments of Morgan Murphy Media at 6-7 ("Morgan Murphy Comments"); Comments of the National Association of Broadcasters at 23-33 ("NAB Comments"); Comments of the NBC Television Affiliates at 18-19 ("NBC Affiliates Comments"); Comments of Nexstar Broadcasting, Inc. at v, 20-22 ("Nexstar Comments"); Comments of Sinclair Broadcast Group, Inc. at 23-26 ("Sinclair Comments"); Comments of the Writers Guild of America, West, Inc. at 10 ("WGAW Comments"); Reply Comments of Barrington Broadcasting Group, LLC *et al.* at 6 ("Joint Broadcasters Reply"); Reply Comments of Journal Broadcast Corporation at 4-5 ("Journal Reply"); Reply Comments of LIN Television Corporation at 4, 17-20 ("LIN Reply"); Reply Comments of the National Association of Broadcasters at 47-53 ("NAB Reply").

[32] *See* NAB Comments at 24-25.

[33] *See, e.g.,* Belo Comments at 23; CBS Affiliates Comments at 19; NAB Comments at 27; NBC Affiliates Comments at 18; Nexstar Comments at 20-22; Sinclair Comments at 23-24; Journal Reply at 4; NAB Reply at 47, 50-51.

[34] *See, e.g.,* CBS Affiliates Comments at 20; Joint Broadcasters Comments at 21; NAB Comments at 26; WGAW Comments at 10; NAB Reply at 48, 51.

[35] *See* Sinclair Comments at 23, 25.

[36] *See, e.g.,* Belo Comments at 23; Joint Broadcasters Comments at 22; LIN Comments at 19; NAB Comments at 33; NBC Affiliates Comments at 19; Sinclair Comments at 26; Joint Broadcasters Reply at 6; NAB Reply at 50.

[37] *See, e.g.,* LIN Comments at 19; NAB Comments at 23.

[38] *See* Sinclair Comments at 23.

A. Need for the Prohibition on Joint Negotiation

9. Based on our review of the record,[39] and pursuant to our authority in Section 325 of the Act,[40] we revise Section 76.65(b) of our rules to provide that it is a violation of the Section 325(b)(3)(C)(ii) duty to negotiate in good faith for a Top Four television broadcast station (as measured by audience share) to negotiate retransmission consent jointly with another such station if the stations serve the same geographic market and are not commonly owned.[41] We find persuasive the arguments of MVPDs and public interest groups who uniformly assert that adopting a rule prohibiting joint negotiation is necessary to prevent the competitive harms resulting from such negotiation.

10. In the *NPRM*, the Commission broadly sought comment on whether it should be a violation for any television broadcast station to grant another station or station group the right to negotiate or the power to approve its retransmission consent agreement when the stations are not commonly owned.[42] However, the evidence in this proceeding persuades us to take a more limited approach, prohibiting outright only television broadcast stations that are ranked among the top four stations as measured by audience share from negotiating retransmission consent jointly with another such station, if the stations are not commonly owned and serve the same geographic market. Although economic theory supports a conclusion that joint negotiation among any two or more separately owned broadcast stations serving the same DMA will invariably tend to yield retransmission consent fees that are

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[39] In this *Order*, we do not address arguments that are more appropriately considered in other Commission proceedings, such as those relating to possible attribution of agreements that provide for joint negotiation of retransmission consent under the Commission's ownership rules. *See 2014 Quadrennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 14-50, Further Notice of Proposed Rulemaking and Report and Order, FCC 14-28 (adopted Mar. 31, 2014).

[40] Section 325(b)(3)(C)(ii) of the Act, which imposes on television broadcast stations a duty to negotiate retransmission consent in good faith, provides, in relevant part:

> The Commission shall . . . revise the regulations governing the exercise by television broadcast stations of the right to grant retransmission consent. . . . Such regulations shall . . . prohibit a television broadcast station that provides retransmission consent from . . . failing to negotiate in good faith, and it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations.

47 U.S.C. § 325(b)(3)(C)(ii).

In addition, Section 325(b)(3)(A) of the Act directs the Commission, among other things:

> to establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent. . . . The Commission shall consider in such proceeding the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier and shall ensure that the regulations prescribed under this subsection do not conflict with the Commission's obligation . . . to ensure that the rates for the basic service tier are reasonable.

47 U.S.C. § 325(b)(3)(A).

[41] As noted above, Section 76.65 of the Commission's rules identifies specific actions or practices that are deemed to violate a television broadcast station's duty to negotiate retransmission consent agreements in good faith. *See supra* ¶ 3 n. 14. In adopting its good faith rules, the Commission stated that the *per se* standards "identify . . . situations in which a broadcaster did not enter into negotiations with the sincere intent of trying to reach an agreement acceptable to both parties," and that the standards constitute a violation of the good faith duty in all possible instances. *See Good Faith Order*, 15 FCC Rcd at 5457, ¶ 31, 5462, ¶ 39.

[42] *See NPRM*, 26 FCC Rcd at 2731, ¶ 23.

higher than those that would have resulted if the stations competed against each other in seeking fees,[43] the record amassed in this proceeding is centered largely around evidence regarding the impact of joint negotiation by Top Four broadcast stations.[44] With regard to Top Four broadcasters, we can confidently conclude that the harms from joint negotiation outstrip any efficiency benefits identified[45] and that such negotiation on balance hurts consumers. Because the record lacks similar evidence with respect to other stations, we decline to adopt a prohibition that applies to all separately owned broadcast stations serving the same geographic market (*i.e.,* regardless of market share).[46]

11. Our decision to adopt a rule addressing joint negotiation by Top Four stations is consistent with the Commission's previous determination, in implementing Section 325(b)(3)(C) of the Act, that agreements not to compete or to fix prices are "inconsistent with competitive marketplace considerations and the good faith negotiation requirement."[47] In the *Good Faith Order*, the Commission stated:

> It is implicit in Section 325(b)(3)(C) that any effort to stifle competition through the negotiation process would not meet the good faith negotiation requirement. Considerations that are designed to frustrate the functioning of a competitive market are not 'competitive marketplace considerations.' Conduct that is violative of national policies favoring competition – that is, for example . . . an agreement not to compete or to fix prices . . . is not within the competitive marketplace considerations standard included in the statute.[48]

12. Although complaints about joint negotiation between or among same market, separately owned Top Four stations could be addressed under our existing rules pursuant to the "totality of circumstances" test, we believe that adopting a rule specifically directed at such negotiation is more effective in preventing the competitive harms derived therefrom than case-by-case adjudication, and is more administratively efficient – particularly because parties entering a negotiation will be advantaged by advance notice of the appropriate process for such negotiation.

13. We conclude that joint negotiation by same market, separately owned Top Four stations is not consistent with "competitive marketplace considerations" within the meaning of Section 325(b)(3)(C) because it eliminates price rivalry between and among stations that otherwise would compete directly for carriage on MVPD systems and the associated retransmission consent revenues.[49] Specifically, we find that joint negotiation gives such stations both the incentive and the ability to impose on MVPDs higher fees for retransmission consent than they otherwise could impose if the stations

[43] *See infra* ¶¶ 14-15.

[44] *See infra* ¶ 16.

[45] *See infra* ¶ 18.

[46] If parties were to present such evidence, however, we may revisit this issue in the future. *See supra* n. 5.

[47] *See Good Faith Order*, 15 FCC Rcd at 5470, ¶ 58. We therefore disagree with NAB's assertion that the Commission previously has found that joint negotiation is consistent with competitive marketplace considerations. *See infra* ¶ 21 (addressing NAB's argument that a rule prohibiting joint negotiation is inconsistent with Commission precedent).

[48] *See Good Faith Order*, 15 FCC Rcd at 5470, ¶ 58.

[49] Our decision to adopt a rule proscribing joint negotiation is not premised on a finding that joint negotiation by separately owned, same market Top Four stations could lead to negotiating delays and other complications, *see NPRM*, 26 FCC Rcd at 2731, ¶ 23, but rather on our conclusion that such negotiation diminishes competition and thus leads to supra-competitive increases in retransmission consent fees. Thus, we do not address the merits of arguments that joint negotiation does not result in negotiating delays or other complications. *See, e.g.,* LIN Comments at 19; NAB Comments at 23.

conducted negotiations for carriage of their signals independently.[50] Because same market, Top Four stations are considered by an MVPD seeking carriage rights to be at least partial substitutes for one another,[51] their joint negotiation prevents an MVPD from taking advantage of the competition or substitution between or among the stations to hold retransmission consent payments down.[52] The record also demonstrates that joint negotiation enables Top Four stations to obtain higher retransmission consent fees because the threat of simultaneously losing the programming of the stations negotiating jointly gives those stations undue bargaining leverage in negotiations with MVPDs.[53] This leverage is heightened because MVPDs may be prohibited from importing out-of-market broadcast stations carrying the same network programming as the broadcast stations at issue in the negotiations.[54]

14. We therefore disagree with assertions that joint negotiation does not result in increases in retransmission consent compensation paid by MVPDs.[55] Analyses in the record draw on basic economic

[50] *See* Joint Control or Ownership of Multiple Big 4 Broadcasters in the Same Market and Its Effects on Retransmission Consent Fees, William P. Rogerson, May 18, 2010, at 3 (attached to ACA's Comments in response to *PN*) (stating that, in a number of local television markets, multiple Top Four stations act as a single entity in retransmission consent negotiations because such stations enter into agreements to jointly negotiate retransmission consent, and that such coordinated activity permits broadcasters to negotiate higher retransmission consent fees) ("Rogerson Joint Control Analysis").

[51] In this context, the term "substitute" means that "the marginal value to the MVPD of either network is lower conditional on already carrying the other network." *See id.* at 7-8. In his analysis, Rogerson emphasizes that, even when this condition holds, the MVPD still would desire to carry both networks and would make higher profits from carriage of both. The numerical example proffered by Rogerson reflects this condition—the MVPD is assumed to earn a profit of $1.00 per subscriber if it carries only one of the two networks and a profit of $1.50 per subscriber if it carried both of the networks. Rogerson observes that "[t]o the extent that customers appreciate and are willing to pay for increases in variety at a diminishing rate as variety increases, we would expect this condition to hold." *See id.* at 8-9. A good, although limited, example of partial substitution in this context would be local news and weather, which would typically be available on all Top Four broadcast stations in a market.

[52] *See* An Economic Analysis of Consumer Harm from the Current Retransmission Consent Regime, Michael L. Katz, *et al.*, Nov. 12, 2009, at 26-29, ¶¶ 38-43 (asserting that, "to the extent broadcast stations entering into local marketing agreements are substitutes, such agreements eliminate competition and raise stations' bargaining power, which result in higher fees and harm consumers") ("Katz Analysis of Consumer Harm"); Economic Analysis of Broadcasters' Brinksmanship and Bargaining Advantages in Retransmission Consent Negotiations, Steven C. Salop, *et al.,* June 3, 2010, at 53, ¶ 108 ("[J]oint negotiation eliminates competition between [local broadcast stations serving the same market], and the MVPD is unable to gain a bargaining advantage by playing one broadcaster off against another.") ("Salop Brinksmanship Analysis").

[53] *See* Coordinated Negotiation of Retransmission Consent Agreements by Separately Owned Broadcasters in the Same Market, William P. Rogerson, May 27, 2011, at 11 (attached to ACA's Comments in response to *NPRM*) ("Rogerson Coordinated Negotiation Analysis"). A 2007 Congressional Research Service report on retransmission consent made a similar observation with regard to top network affiliates:

> [W]here a broadcaster . . . controls two stations that are affiliated with major networks, that potentially gives that broadcaster control over two sets of must-have programming and places a distributor . . . in a very weak negotiating position since it would be extremely risky to lose carriage of both signals.

See ACA Comments at 9, citing Charles B. Goldfarb, CRS Report for Congress, *Retransmission Consent and Other Federal Rules Affecting Programmer-Distributor Negotiations: Issues for Congress,* at CRS-70 (July 9, 2007), available at http://www.policyarchive.org/handle/10207/bitstreams/19204.pdf.

[54] *See FNPRM,* Section IV *infra*.

[55] *See, e.g.*, Letter from Jane E. Mago, Executive Vice President and General Counsel for NAB, to Marlene H. Dortch, Secretary, FCC, at 3 (Dec. 5, 2013) ("NAB Dec. 5, 2013 *Ex Parte* Letter"); Letter from Jennifer A. Johnson and Eve R. Pogoriler, Counsels for Bonten Media Group, Inc., to Marlene H. Dortch, Secretary, FCC, at 4 (Jan. 22, 2013) ("Bonten Jan. 22, 2013 *Ex Parte* Letter").

principles to explain why coordinated conduct such as joint negotiation results in higher retransmission consent fees:

> [I]f two broadcasters can collectively threaten to withdraw their signals unless they are each satisfied, then they will be able to negotiate higher fees for everyone than if each broadcaster can only threaten to withdraw its own signal unless the broadcaster is satisfied. . . . [I]t is the ability to threaten collective withdrawal that creates the power to raise retransmission consent fees.[56]

The proposition that, when providers of inputs that are at least partial substitutes for one another bargain jointly with a downstream user of the inputs, the returns to the input providers are higher than if the input providers negotiated separately with the downstream user, has been validated in other economic contexts.[57] This general proposition is also reflected in the Federal Trade Commission ("FTC") and Department of Justice ("DoJ") merger[58] and collaboration[59] guidelines. DoJ has recognized that

[56] *See* Rogerson Coordinated Negotiation Analysis at 3, 11. *See also* ACA Comments at 9, citing 2010 Rogerson Joint Control Analysis at 7-8. In his analyses, Rogerson presents a bilateral bargaining model to analyze the impact of joint negotiation on retransmission consent fees. The model considers a hypothetical example of two television broadcast stations negotiating for carriage with a cable operator, and compares the outcomes on the assumption of separate negotiations and on the assumption of joint negotiation. The model, illustrated by a numerical example, reflects the assumption that the two stations are partial substitutes. *See* Rogerson Joint Control Analysis at 7-8. *See also* Aviv Nevo, Deputy Assistant Att'y Gen. for Economics, Antitrust Div., Dep't of Justice, Remarks at the Stanford Institute for Economic Policy Research and Cornerstone Research Conference on Antitrust in Highly Innovative Industries: Mergers that Increase Bargaining Leverage 3-5 (Jan. 22, 2014) (employing a similar model and assumptions to support an assertion that joint negotiation by two input providers leads to increases in the prices paid by a distributor).

[57] The quintessential example of joint negotiation by input providers is collective bargaining by union members. A paper by Horn and Wolinsky addresses the question whether, if a firm employs workers of two types, it is better for the workers to form two separate unions or one "encompassing" union. *See* Henrik Horn & Asher Wolinsky, *Worker Substitutability and Patterns of Unionisation*, 98 THE ECONOMIC JOURNAL 484-497 (1988). The paper "developed a bargaining model for the case in which two groups of workers face a single employer. . . [and] pointed out a fairly general principle whose implication . . . was that, when the two types of workers are substitute factors, they would benefit from coordinating their bargaining with the employer." *Id.* at 496. The paper begins with a bargaining model that involves two workers (one of each type) who negotiate with a single employer. The model shows that, when the workers are substitutes, total wages are higher if they negotiate jointly. The paper goes on to extend the model to the case of two groups of workers, with analogous results, but the base model has the same structure as that in the Rogerson Joint Control Analysis.

[58] *See* U.S. Department of Justice and the Federal Trade Commission *Horizontal Merger Guidelines*, issued August 19, 2010 (available at http://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf.) ("Merger Guidelines"). Section 6.2 of the Merger Guidelines reads, in pertinent part:

> In many industries, especially those involving intermediate goods and services, buyers and sellers negotiate to determine prices and other terms of trade. In that process, buyers commonly negotiate with more than one seller, and may play sellers off against one another . . . . A merger between two competing sellers prevents buyers from playing those sellers off against each other in negotiations. This alone can significantly enhance the ability and incentive of the merged entity to obtain a result more favorable to it, and less favorable to the buyer, than the merging firms would have offered separately absent the merger.

Id. at 22. The Merger Guidelines note that the mechanism and the magnitude of the effect on price can vary with certain structural characteristics, and the specific discussion refers to situations when the products are complete substitutes, *e.g.*, the buyer would not necessarily purchase from both providers separately. Nevertheless, the "collective withdrawal" mechanism of the Rogerson model is analogous to the ability of two merged, formerly competing sellers to prevent a buyer from playing one against the other. And the result is the same as in the Rogerson model—enhanced ability and incentive of the merged entity "to obtain a result more favorable to it, and less favorable to the buyer." *Id.* Thus, the cited proposition from the Merger Guidelines also applies to joint negotiation by entities that are not seeking to merge. In a recent *ex parte* filing in the Quadrennial Review

(continued….)

collaboration by competing broadcast stations could "harm competition by increasing the potential for firms to coordinate over price or other strategic dimensions, and/or by reducing incentives of firms to compete with one another."[60]

15. In its review of the Comcast-NBCU transaction, the Commission stated that this theory of harm "is a well-established concern in antitrust enforcement" and concluded that coordinated negotiations of carriage rights for two blocks of "must have" programming (in that case, an NBC owned and operated station (O&O) and a Comcast Regional Sports Network ("RSN")) would give increased bargaining leverage to the programmer and lead to higher prices for an MVPD buyer, who would be at risk of losing two highly desirable signals if negotiations failed to yield an agreement.[61] In particular, the Commission

(Continued from previous page)
proceeding, DoJ stated that, "[w]here a proposed cooperative agreement essentially combines the operations of two rivals and eliminates all competition between them . . ., [DoJ] analyzes the agreement as it would analyze a merger, regardless of how the arrangement has been labeled. . . ." *See Ex Parte* Filing of the Department of Justice, MB Docket Nos. 09-182, 07-294, 04-256, February 20, 2014, at 10 ("DoJ Feb. 20, 2014 *Ex Parte* filing").

[59] *See* Federal Trade Commission and U.S. Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (Apr. 2000) (available at http://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf .) ("Collaboration Guidelines"). The Collaboration Guidelines state, in relevant part, that:

> Competitor collaborations may involve agreements jointly to sell, distribute, or promote goods or services that are either jointly or individually produced. Such agreements may be procompetitive, for example, where a combination of complementary assets enables products more quickly and efficiently to reach the marketplace. However, marketing collaborations may involve agreements on price, output, or other competitively significant variables, or on the use of competitively significant assets, such as an extensive distribution network, that can result in anticompetitive harm. Such agreements can create or increase market power or facilitate its exercise by limiting independent decision making; by combining in the collaboration, or in certain participants, control over competitively significant assets or decisions about competitively significant variables that otherwise would be controlled independently; or by combining financial interests in ways that undermine incentives to compete independently. For example, joint promotion might reduce or eliminate comparative advertising, thus harming competition by restricting information to consumers on price and other competitively significant variables.

Id. at 14.

[60] *See* DoJ Feb. 20, 2014 *Ex Parte* filing at 17.

[61] *See Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees,* Memorandum Opinion and Order, 26 FCC Rcd 4238, 4294 ¶¶ 135-136 (2011) ("*Comcast-NBCU Order*"). The Commission stated:

> If failing to reach an agreement with the seller will result in a worse outcome for the buyer – if its alternatives are less attractive than they were before the transaction – then the buyer's bargaining position is weakened and it can expect to pay more for the products. . . . If not carrying either the NBC [O&O] or the RSN places the MVPD is a worse competitive position than not carrying one but still being able to carry the other, the MVPD will have less bargaining power after the transaction, and is at risk of having to pay higher rates.

The Commission employed the type of bargaining model proposed by Rogerson to analyze this situation and then validated its theoretical analysis by examining the impact of the integration of a Fox O&O station with a Fox RSN. Using a control group of Fox RSNs not jointly owned with a local television station, the empirical analysis indicated that integration allowed Fox to charge a higher price for the RSN than it could have realized without the integration. *Id.* at 4398, Appendix B, ¶ 54. The Commission approved the transaction, but only on the condition that the newly combined entity not discriminate against competitor MVPDs or raise their costs by charging them higher programming fees. The Commission also imposed a "baseball-style" arbitration to enforce this non-discrimination requirement. *Id.* at 4259, ¶ 50.

found that common "ownership of these two types of programming assets in the same region allowed the joint venture to charge a higher price for the RSN relative to what would be observed if the RSN and local broadcast affiliate were separately-owned."[62] Although the Commission in that context was considering the competitive effects of combining a broadcast network and an RSN, we believe that two (or more) broadcast stations that are ranked among the top four stations in a market by audience share offer at least a comparable level of substitution to an MVPD bargaining for carriage rights.[63] Furthermore, Rogerson's bargaining model suggests that the more valuable the stations' programming is, the greater is the increase in retransmission consent fees resulting from joint negotiation.[64] We thus find it reasonable to infer that the magnitude of fee increases derived from joint negotiation is larger for Top Four station combinations than for other stations.

16. Empirical data in the record lends support to the theory that joint negotiation by Top Four stations leads to increases in retransmission consent fees. In particular, ACA references an example indicating that, where a single entity controls retransmission consent negotiations for more than one Top Four station in a single market, the average retransmission consent fees paid for such stations was more than twenty percent higher than the fees paid for other Top Four stations in those same markets.[65] Data filed in the record from three cable operators also lends support to our conclusion that joint negotiation between or among separately owned, same market Top Four stations leads to supra-competitive increases in retransmission consent fees.[66] We find these empirical data to be persuasive evidence of how joint negotiation can affect the level of retransmission consent fees in cases involving Top Four stations operating in the same market. In view of the apparent widespread nature of joint negotiation involving

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[62] *Id.* at 4399, Appendix B, ¶ 55.

[63] We thus disagree with NAB's suggestion that same market, separately owned Top Four stations are not substitutes for one another. *See* Supplemental Comments of the National Association of Broadcasters at 15 ("NAB Supplemental Comments"), citing Reply Declaration of J.A. Eisenach and K.W. Caves at 14 (attached to NAB Comments) (arguing that same market stations that are not commonly owned do not compete against each other for retransmission consent fees).

[64] Because Rogerson's model assumes that the percentage split between the broadcast stations and the MVPD of the joint profits of carriage does not vary as the value of the stations' programming increases, it follows as a matter of arithmetic that as the value of the stations' programming increases, so does the magnitude of the retransmission consent fee.

[65] Rogerson Joint Control Analysis at 11-12, citing *Ex Parte* Comments of Suddenlink Communications in Support of Mediacom Communications Corporation's Retransmission Consent Complaint*, Mediacom Communications Corp., Complainant v. Sinclair Broadcast Group, Inc.*, *Defendant*, CSR No. 8233-C, 8234-M, at 5. The Suddenlink data on which ACA and Rogerson rely was filed in the context of a Commission complaint proceeding. Rogerson asserts that, although the Suddenlink study represents only one data point, the widespread use of non-disclosure clauses in retransmission consent agreements limits the amount of publicly available information that would permit a more comprehensive analysis of how joint negotiation affects retransmission consent fees. *Id.* at 11.

[66] *See* Letter from Scott Ulsaker, Pioneer Telephone Cooperative, to Marlene H. Dortch, Secretary, FCC, at 1 (Feb. 20, 2014) (reporting that the average fees paid to separately owned, same market stations affiliated with Top Four networks that coordinated their retransmission consent negotiations in 2010 were thirty percent higher than the average fees paid to stations affiliated with Top Four networks that did not engage in coordinated negotiations); Letter from Christopher A. Dyrek, Cable America Missouri LLC, to Marlene H. Dortch, Secretary, FCC, at 1-2 (Feb. 20, 2014) (reporting that the average retransmission consent fees for Top Four stations that coordinated their retransmission consent negotiations in 2010 were more than thirty percent higher than the fees for separately negotiated Top Four stations, and that current data reflect that the average retransmission consent fees paid to Top Four stations that engage in joint negotiation are almost 19 percent higher than the average fees paid to Top Four stations that negotiate independently); Letter from Stuart Gilbertson, USA Communications, to Marlene H. Dortch, Secretary, FCC, at 1 (Feb. 24, 2014) (reporting that the average retransmission consent fees paid to separately owned, same market Top Four network affiliates that coordinated their retransmission consent negotiations in 2010 were 43 percent higher than the fees paid to Top Four stations that negotiated separately).

Top Four stations[67] and the expected growth of retransmission consent fees,[68] we find that the record provides ample support for our decision to adopt a rule barring joint negotiation by same market, separately owned Top Four stations.

17. We believe that a rule barring joint negotiation may, by preventing supra-competitive increases in retransmission consent fees, tend to limit any resulting pressure for retail price increases for subscription video services.[69] While there is an argument that at least a part of retransmission fee increases likely will be passed on to consumers, our decision to adopt a prohibition on joint negotiation is not premised on rate increases at the retail level.[70] Cable operators are not required to pass through any savings derived from lower retransmission consent fees,[71] and fee increases resulting from joint negotiation may not compare in magnitude to other costs that MVPDs incur.[72] But artificially higher retransmission rates do increase input costs for MVPDs, and anticompetitive harm can be found at any level of distribution. Nor is the possibility that supra-competitive retransmission consent fees derived

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[67] *See* ACA Comments at 7; ACA Reply at 33-35 (identifying 56 instances where multiple Top Four broadcast affiliates in the same DMA operate pursuant to a sharing agreement and confirming that in 36 of those instances, there was a single negotiator for two broadcast stations, and reaching carriage terms for one station was contingent on reaching terms for the other); Letter from Barbara S. Esbin, Counsel to the American Cable Association, to Marlene H. Dortch, Secretary, FCC, at 2 (Nov. 20, 2012) (stating that ACA has documented 48 instances of joint negotiation in 43 DMAs among separately owned broadcasters). *See also* DIRECTV Dec. 6, 2013 *Ex Parte* Letter and Attachment (reporting 42 instances in which DIRECTV negotiates retransmission consent with a single entity that negotiates for two "Big Four" affiliated stations in the same DMA due to contractual arrangements).

[68] *See* Rogerson Coordinated Negotiation Analysis at 23; Salop Brinksmanship Analysis at 16-18. In their analysis, Salop, *et al.* assert that total retransmission consent fees for MVPDs increased from $214.6 million in 2006 to $1.1 billion in 2010, and project that such fees will grow to $2.6 billion by 2016. *See id.* *See also* Video Program Costs and Cable TV Prices: A Comment on the Analysis of Dr. Jeffrey Eisenach, Steven C. Salop *et al.,* June 1, 2010, at 5 n.10 ("Salop Video Program Costs Analysis"), citing Morgan Stanley, *Cable/Satellite Pricing, Programming, and Payout Keys to 2010,* January 26, 2010 (discussing a Morgan Stanley report's conclusion that "programming cost growth remains a structural problem for the industry, and the addition of retransmission consent payments will accelerate cost growth in the near-term. . . . We expect retransmission payments to drive 30-40% of total programming cost growth in 2010E-2014E."); http://www.snl.com/InteractiveX/articleabstract.aspx?ID=25877327&KPLT=2 (visited February 3, 2014) (projecting retransmission consent fees to reach $7.6 billion by 2019); Morgan Stanley Retransmission Revenue Primer, Morgan Stanley & Co. LLC, Dec. 12, 2013 at 7 (projecting retransmission consent fees to reach $9.1 billion by 2020). The fact that retransmission consent fees may continue to escalate even absent a rule barring joint negotiation does not justify permitting stations to engage in conduct that inflates those fees beyond competitive levels.

[69] *See* DoJ Feb. 20, 2014 *Ex Parte* filing at 9 ("MVPDs typically pay per-subscriber fees to retransmit the broadcaster's signal, known as retransmission consent fees. The size of these fees affects the rates that consumers are charged for an MVPD subscription. Although MVPDs may carry hundreds of channels altogether, the local broadcast television stations usually have the highest viewership.").

[70] Thus, we do not address arguments that joint negotiation does not adversely affect cable rates. *See* NAB Comments at 42; Comments of the Walt Disney Company at 14 ("Disney Comments"). *See also* Comments of Entravision Holdings, LLC in the 2010 Quadrennial Review at 15; Comments of LIN Television Corp. in the 2010 Quadrennial Review at 14-15; Comments of the Coalition to Preserve Local TV Broadcasting in the 2010 Quadrennial Review at 16; Comments of Sinclair Broadcasting Group, Inc. in the 2010 Quadrennial Review at 20.

[71] *See* NAB Dec. 5, 2013 *Ex Parte* Letter at 4.

[72] *See, e.g.,* NAB Comments at 27; NAB Supplemental Comments at 2-3 (arguing that ACA expresses the purported increases in retransmission consent fees in percentage terms, rather than dollar amounts, because any such increases are so small); Nexstar Comments at 21 (asserting that the negotiated rate for retransmission consent would not change if Nexstar were required to cease joint negotiation); Reply Comments of the Broadcaster Associations at 24 ("Broadcaster Associations Reply") ("[I]f Suddenlink [pays] more to Big 4 stations involved in joint negotiations, that amounts to only three cents more per subscriber per month for each station.").

from joint negotiation might enable broadcasters to invest in higher quality programming, as some parties assert,[73] a valid basis for permitting an anticompetitive arrangement that generates those fees. We reject the suggestion that the public interest is served merely because an arrangement generally increases the funds available to broadcasters, if that arrangement otherwise is anticompetitive and potentially harmful to consumers.

18. We are not persuaded by opponents of a prohibition on joint negotiation who argue that joint negotiation promotes efficiency by reducing transaction costs, and that the cost savings, in turn, lead to lower retransmission consent rates.[74] NAB further asserts that, to the extent joint negotiation lowers transaction costs, broadcasters are able to devote resources to programming and services that more directly serve the viewing public.[75] Moreover, NAB asserts that joint negotiation permits retransmission consent agreements to be completed expeditiously by reducing the total number of agreements that must be negotiated, thus decreasing the administrative burdens for both broadcast stations and MVPDs.[76] The claimed efficiencies are not ongoing operational efficiencies, but rather asserted savings of transaction costs in connection with isolated transactions that occur for any broadcaster at three-year or even longer intervals.[77] We therefore believe that any such efficiencies are likely to be modest and outweighed by the harm from an anticompetitive practice that the record indicates generates supra-competitive retransmission consent fees.[78]

19. Sinclair contends that prohibiting joint negotiation would arbitrarily harm certain broadcasters based on spectrum allocation and market size. In particular, Sinclair asserts that, because common ownership is permitted in markets with a sufficient number of stations (thereby allowing a

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[73] *See* Declaration of Jeffrey A. Eisenach and Kevin W. Caves, May 27, 2011, at 11 (Attachment A to NAB Comments); Proposals for Reform of the Retransmission Consent Good Faith Bargaining Rules: An Economic Analysis, Michael G. Baumann, May 27, 2011, at 22-23 (Exhibit 1 to Sinclair Comments). *See also* Belo Comments at 3, 6; Comments of CBS Corporation at 12 ("CBS Comments"); Disney Comments at 9; Comments of Fox Entertainment Group, Inc. and Fox Television Stations, Inc. at 19 ("Fox Comments"); Comments of Gilmore Broadcasting Corp. *et al.* at 3 ("Gilmore *et al.* Comments"); LIN Comments at 10, 14-15; NAB Comments at 3, 5-6, 43; NBC Affiliates Comments at 21; Comments of the Named State Broadcasters Association at 3-5 ("NSBA Comments"); Sinclair Comments at 2, 8-9; WGAW Comments at 3, 12; Reply Comments of the Director's Guild of America at 2-4 ("DGA Reply"); Reply Comments of Fox Entertainment Group, Inc. and Fox Television Stations, Inc. at 3 ("Fox Reply"); Reply Comments of the Indiana Utility Regulatory Commission at 3 ("Indiana Commission Reply"); LIN Reply at ii; NAB Reply at 7-8; Reply Comments of Univision Communications Inc. at 2-3 ("Univision Reply") (all generally asserting that, without sufficiently high retransmission fees, broadcasters will be unable to compete for premium programming, and that programming will migrate to pay television).

[74] *See* Belo Comments at 23; CBS Affiliates Comments at 19; NAB Comments at 27; NBC Affiliates Comments at 18; Nexstar Comments at 20-22; Sinclair Comments at 23; Journal Reply at 4; LIN Reply at 19-20; NAB Reply at 47, 50-52; Letter from Jonathan D. Blake and Eve R. Pogoriler, Counsels for the Coalition of Smaller Market Television Stations, to Marlene H. Dortch, Secretary, FCC, at 1 (Dec. 21, 2011) ("CSMTS Dec. 21, 2011 *Ex Parte* Letter"); Letter from Jonathan D. Blake and Jennifer A. Johnson, Counsels for the Coalition of Smaller Market Television Stations, to Marlene H. Dortch, Secretary, FCC, at 1 (Feb. 1, 2012) ("CSMTS Feb. 1, 2012 *Ex Parte* Letter"); Bonten Jan. 22, 2013 *Ex Parte* Letter at 2.

[75] *See* NAB Comments at 27.

[76] *Id.*

[77] As ACA notes, the costs that are spared by allowing stations to engage in joint negotiation likely are limited to the cost of hiring a negotiator and related administrative expenses. *See* ACA Reply at 36. In addition, these costs are borne by stations relatively infrequently because retransmission consent negotiations typically occur only every three years. Rogerson Coordinated Negotiation Analysis at 18.

[78] *See* DoJ Feb. 20, 2014 *Ex Parte* filing at 13-15 ("Cooperative agreements between broadcasters may . . . raise substantial competitive concerns. . . . [T]o avoid being deemed per se illegal [under antitrust law], activities such as . . . *joint retransmission consent negotiations* would have to be shown to be reasonably necessary to some other efficiency-enhancing combination of the operations of the stations.") (emphasis added).

broadcaster to negotiate on behalf of two co-owned stations), a ban on joint negotiation would unfairly single out broadcasters located in markets having too few broadcast stations to permit common ownership under the Commission's rules.[79] We find that unpersuasive. We note that the local television ownership rule prohibits Top Four stations from being commonly owned in markets of any size.[80] Therefore, the rule that we adopt today will not, as Sinclair suggests, have a disparate adverse impact on separately owned Top Four stations in small markets.

20. We reject assertions that the Commission should permit joint negotiation because it promotes a level playing field for stations in small and medium sized markets where an MVPD has significant bargaining leverage.[81] The size and bargaining power of individual broadcasters and MVPDs vary significantly from market to market, depending on market size, concentration, popularity of programming, and many other factors. We do not consider it the Commission's role in the retransmission consent process to adjust bargaining power between suppliers and their customers by countenancing anti-competitive practices. But we do see it as our role to prohibit arrangements among competitors that eliminate competition among them and thereby generate supra-competitive retransmission consent fees, because "any effort to stifle competition through the negotiation process would not meet the good faith negotiation requirement" imposed by Congress.[82]

21. We disagree with NAB's assertion that the Commission previously has found that joint negotiation is consistent with competitive marketplace considerations.[83] In particular, NAB contends that adopting a prohibition on joint negotiation is inconsistent with the Commission's statement in the *Good Faith Order* that "[p]roposals for carriage conditioned on carriage of any other programming, such as . . . another broadcast station either in the same or a different market" are "presumptively . . . consistent with competitive marketplace considerations and the good faith negotiation requirement."[84] However, the cited language in the *Good Faith Order* can reasonably be read to address the issue of whether broadcasters may lawfully seek in-kind retransmission consent compensation in the form of carriage of

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[79] *See* Sinclair Comments at 25.

[80] *See* 47 C.F.R. § 73.3555(b).

[81] *See* NAB Comments at 29-30 (asserting that, even in cases where a "small" MVPD is involved, broadcasters still are at a disadvantage due to the large local market share held by the MVPD; thus, MVPDs have significant leverage over broadcasters in retransmission consent negotiations); Comments of Morgan Murphy Media to the *PN* in MB Docket. No. 10-71 at 8-9 ("Not every retransmission consent dispute pits a large broadcasting company against a large MVPD; thus, adoption of 'one-size-fits-all' national rules, such as those proposed by the Petitioners, would ignore the particular facts and circumstances that apply in local markets, to the detriment of local small broadcast businesses."); WGAW Comments at 10 (claiming that joint negotiation helps small broadcasters that must negotiate with MVPDs possessing significant market power); CSMTS Dec. 21, 2011 *Ex Parte Letter* at 4-6 (asserting that MVPDs have significant "economic clout" relative to some broadcasters, and noting the annual revenues of large MVPDs and the trend towards market concentration). *See also* CBS Affiliates Comments at 20; Joint Broadcasters Comments at 21; NAB Reply at 48.

[82] *Good Faith Order*, 15 FCC Rcd at 5470, ¶ 58. In addition, as ACA asserts:

> [E]ven if one were to accept the idea that collusion between sellers should be permitted when they negotiate prices with a large buyer, it would be a 'huge leap to conclude that the fact that there are some local markets that have a single buyer implies that sellers in ALL markets should be allowed to collude in negotiations with ALL buyers'; and (ii) the idea that it would be good public policy to let separately owned sellers collude in negotiations with a large buyer is itself 'highly problematic to say the least,' and not widely accepted among competition policy scholars.

See ACA Reply at 37, citing Rogerson Joint Control Analysis at 17.

[83] *See* NAB Comments at 24-25.

[84] *Id.* at 25.

other programming owned by the broadcaster itself, not programming owned by other entities.[85] Interpreting that language to permit a broadcast station to tie carriage of its signal to carriage of a signal transmitted by a separately owned broadcast station in the same market would be at odds with the Commission's statement later in the *Good Faith Order* that "an agreement not to compete or to fix prices . . . is not within the competitive marketplace considerations standard included in the statute."[86] We thus reject NAB's reading of the *Good Faith Order*.

22. We believe that prohibiting joint negotiation is harmonious with antitrust law, which generally prohibits contracts or combinations in restraint of trade.[87] In particular, we find that joint negotiation between or among Top Four stations that are not commonly owned and that serve the same market is akin to the type of coordinated conduct disfavored by antitrust law because, as discussed above, the stations negotiating jointly are programming inputs for an MVPD that are at least partially

[85] *See* ACA Reply at 13-14.

[86] *See Good Faith Order,* 15 FCC Rcd at 5470, ¶ 58.

[87] Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade," including price fixing and collusive arrangements. *See* 15 U.S.C. § 1. We note that DoJ has brought one antitrust action based on the theory that joint negotiation results in anticompetitive increases in retransmission consent fees. In *U.S. v. Texas Television, Inc., et al.,* DoJ alleged that the ABC, NBC and CBS affiliates operating in the Corpus Christi, Texas market violated Section 1 of the Sherman Act by entering into "combinations and conspiracies in unreasonable restraint of interstate trade and commerce" that consisted of "agreements, understandings and concerted actions . . . to increase the price of retransmission rights to cable companies." *See* Complaint, *U.S. v. Texas Television, Inc., Gulf Coast Broadcasting Company, and K-Six Television, Inc.,* Civil Action No. C-96-64 (S.D. Texas, 1996) at 5, *available at* http://www.justice.gov/atr/cases/f0700/0745.htm. The court appended to its final judgment DoJ's Competitive Impact Statement, which identified alleged harms resulting from the defendants' joint negotiation. *See U.S. v. Texas Television, Inc., Gulf Coast Broadcasting Company, and K-Six Television, Inc.,* Civil Action No. C-96-64, 1996 WL 859988 at *5 (S.D. Texas, Feb. 15, 1996). The Competitive Impact Statement stated:

> The Supreme Court has long recognized that certain types of concerted refusals to deal or group boycotts [are] *per se* violations of the Sherman Act, even when they fall short of outright price-fixing. The agreements between the broadcasters fell into this category because they had the purpose and effect of raising the price of retransmission rights . . . . Moreover, the Supreme Court has held that an agreement between rival companies that restrains competition between them is illegal when it lacks, as did the agreements among these broadcasters, any pro-competitive justification. Although the 1992 Cable Act gave broadcasters the right to seek compensation for retransmission of their television signals, the antitrust laws require that such rights be exercised individually and independently by broadcasters. When competitors in a market coordinate their negotiations so as to strengthen their negotiating positions against third parties and so obtain better deals . . . their conduct violates the Sherman Act.

Id. at 6-8. While *Texas Television* addressed a specific factual scenario that is not before us here, DoJ's action supports our conclusion that joint negotiation by Top Four stations not commonly owned is harmful to competition. As noted above, DoJ, in its *ex parte* filing in the Quadrennial Review proceeding, reinforced this conclusion. *See* DoJ Feb. 20, 2014 *Ex Parte* filing at 14-15. Thus, antitrust principles point in the same direction as the prohibition we adopt today although, of course, our authority under Section 325 is not limited to the prohibition of conduct that falls within the scope of the Sherman Act and a showing that, in a particular case, joint negotiation would not be actionable under Section 1 of the Sherman Act would not defeat the exercise of the statutory power that Congress separately and specifically has provided to the Commission. Although DoJ's action was targeted at coordinated behavior by broadcast stations with significant market share like the rule we adopt here, we find that the adoption of targeted, prescriptive rules is more efficient and effective in preventing the competitive harms derived from joint negotiation than case-by-case antitrust litigation, which Sinclair has suggested. *See* Sinclair Comments at 23.

substitutable.[88] In other words, absent their coordination, such stations would compete head-to-head for distribution on MVPD systems and the associated retransmission consent revenues.

23. The Commission on multiple occasions has drawn on antitrust principles in exercising its responsibility under the Act to regulate broadcasting in the public interest.[89] Indeed, the Commission's authority under Title III of the Act to regulate broadcasting in the public interest empowers us to prescribe regulation that not only prevents anticompetitive practices, but also affirmatively promotes competition.[90] And we have concluded that conduct that violates our national policies favoring competition is "not within the competitive marketplace considerations standard" set forth in Section 325(b)(3)(C) of the Act.[91]

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[88] *See* Salop Brinksmanship Analysis at 53 n.126 (asserting that, to the extent joint negotiation eliminates competition between stations and strengthens broadcasters' bargaining position, it may violate the antitrust laws); OPASTCO *et al*. Comments at 11; ACA Reply at 6; Response of the National Cable and Telecommunications Association to Supplemental Comments of the National Association of Broadcasters at 2 (asserting that joint negotiation thwarts competition and is akin to price-fixing by sellers).

[89] In establishing its early chain broadcasting regulations, for example, the Commission stated:

> The prohibitions of the Sherman Act . . . apply to broadcasting. This Commission, although not charged with the duty of enforcing that law, should administer its regulatory powers with respect to broadcasting in the light of the purposes which the Sherman Act was designed to achieve. . . . While many . . . practices raise serious questions under the antitrust laws, our jurisdiction does not depend on a showing that they do in fact constitute a violation of the antitrust laws. . . . We do not predicate our jurisdiction to issue the regulations on the ground that the . . . practices violate the antitrust laws. We are issuing these regulations because we have found that the . . . practices prevent the . . . utilization of radio facilities in the public interest.

See Report on Chain Broadcasting, Docket No. 5060, pp. 46, 83, 83 n. 3 (1941), *aff'd, NBC v. United States*, 319 U.S. 190, 223-24 (1943). *See also Revision of Radio Rules and Policies*, Second Memorandum Opinion and Order, 9 FCC Rcd 7183, ¶ 8 (1994), citing *United States v. FCC*, 652 F.2d 72, 81-82 (D.C. Cir. 1980) (en banc) (quoting *Northern Natural Gas Co. v. FPC*, 399 F.2d 953, 961 (D.C. Cir. 1968)) ("The public interest standard includes examination of competitive issues – indeed, the Commission is empowered to 'make findings related to the pertinent antitrust policies, draw conclusions from the findings, and weigh these conclusions along with other important public interest considerations.'"); *Representation of Stations by Representatives Owned by Competing Stations in the Same Area*, Report and Order, 87 FCC 2d 668, 669, ¶ 3 n.4 (1981) ("Although the Commission does not enforce the antitrust or other laws relating to unfair trade practices, it takes cognizance of the policies expressed in these statutes in its interpretation of the public interest standard found in the Communications Act of 1934. . . . The core of the antitrust law is found in the Sherman Act, 15 USC §§ 1 and 2 (1958) . . . Forbidden under these sections are contracts, combinations, conspiracies which restrain trade. . . ."); *Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, Second Report and Order, 50 FCC 2d 1046, 1049 ¶ 11 (1975) ("Anti-trust policy has been recognized as a correlative source of authority for our diversification policy because requiring competition in the market place of ideas is, in theory, the best way to assure a multiplicity of voices."); *Implementation of Section 26 of the Cable Television Consumer Protection and Competition Act of 1992*, Further Notice of Inquiry, 9 FCC Rcd 1649, ¶ 9 (1994) ("It is not our intention to adjudicate whether specific contracts violate the antitrust laws. Consistent with our statutory mandate, however, we will address . . . whether and to what extent . . . contracts are prohibited by existing statutes, including the antitrust laws. . . . [A]nalytical tools drawn from antitrust law are an appropriate and useful component of our broader public interest examination of . . . contracts.").

[90] *See Amendment of the Commission's Rules to Establish New Personal Communications Services*, Third Memorandum Opinion and Order, 9 FCC Rcd 6908, ¶ 31 ("Our principal goals for PCS include affirmatively promoting competition and preventing anticompetitive behavior. The former goal flows from our explicit mandate under the Communications Act to promote competition in telecommunications and widely disseminate telecommunications licenses.").

[91] *Good Faith Order*, 15 FCC Rcd at 5470, ¶ 58.

B. Elements of the Prohibition on Joint Negotiation

24. *Stations Not "Commonly Owned*." We conclude that we should apply the rule prohibiting joint negotiation only to same market, Top Four broadcast stations that are not "commonly owned"[92] and that we will base the determination regarding whether stations are commonly owned on the Commission's broadcast attribution rules. Although those rules do not define the phrase "commonly owned" or similar phrases, they identify the interests that are deemed to be attributable for purposes of applying the Commission's media ownership restrictions.[93] Stations that are not subject to the prohibition on joint negotiation thus include Top Four stations that are deemed to be under common ownership, operation or control pursuant to Section 73.3555 of the Commission's rules.[94] No party has suggested in this proceeding that, in applying a rule barring joint negotiation, we should define common ownership in a way that is different from how the concept currently is defined in our attribution rules.

25. *Stations that Serve the Same Geographic Market*. For the purpose of applying the rule prohibiting joint negotiation, we also conclude that broadcast stations are deemed to serve the same geographic market if they operate in the same DMA.[95] Because a broadcast station that enters into a retransmission consent agreement with an MVPD is entitled to carriage of its signal within the DMA it serves, broadcast stations are considered to be programming substitutes for an MVPD only if they operate in the same DMA.[96] In addition, Section 76.55(e)(2) of the Commission's rules provides that "a commercial broadcast television station's market . . . shall be defined as its [DMA] . . . as determined by Nielsen Media Research and published in its Nielsen Station Index Directory and Nielsen Station Index US Television Household Estimates or any successor publications."[97] Defining the relevant geographic market as the DMA is consistent with our local television ownership rule, which, as noted above, prohibits an entity from owning, operating, or controlling two stations licensed in the same DMA, with certain exceptions.[98] Parties that support a prohibition on joint negotiation generally seem to agree that the DMA is the relevant geographic market for purposes of a rule barring joint negotiation, and no party has suggested that the geographic market should be defined differently.[99]

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[92] We do not apply the rule to stations that are commonly owned because we find that joint negotiation by such stations does not present the same competitive concerns as joint negotiation by separately owned stations. In cases of common ownership, the local television ownership rule has permitted a combination of interests that is consistent with the rule's goal of ensuring competition among television broadcast stations in a given local television market.

[93] Such interests are not limited to equity interests in a broadcast licensee. *See* 47 C.F.R. § 73.3555 Notes.

[94] *See* 47 C.F.R. § 73.3555 Notes. For example, Top Four stations that the Commission has permitted to be commonly owned, operated, or controlled pursuant to a waiver of the local television ownership rule will be permitted to engage in joint negotiation.

[95] Although we proposed to adopt a rule that was not limited in application to stations serving the same geographic market, *see NPRM,* 26 FCC Rcd at 2731,¶ 23, we adopt a rule that is more narrow in scope because we conclude that the competitive concerns discussed above are present only in cases where joint negotiation involves stations that, absent such negotiation, would compete directly for retransmission consent revenues. Such stations are those that compete for carriage on MVPD systems in the same DMA.

[96] *See Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Reciprocal Bargaining Obligation,* Report and Order, 20 FCC Rcd 10339, 10352, ¶ 29 (2005) (stating that a broadcaster's right to elect between mandatory carriage and retransmission consent applies only within the broadcaster's DMA).

[97] 47 C.F.R. § 76.55(e)(2).

[98] *See* 47 C.F.R. § 73.3555(b). We also note that a prohibition on joint negotiation is generally consistent with our local television ownership rule in that both are designed to preserve competition between and among separately owned stations in local television markets.

[99] *See* ACA Comments at 22-24, Appendix A at 14-16; ACA Reply at 39-40 (suggesting that any agreement between separately owned broadcasters in the same DMA be a violation of the duty to negotiate retransmission

(continued….)

26. "*Top Four" Station.* For the purpose of applying the rule prohibiting joint negotiation, we conclude that a station is deemed to be a Top Four station if it is ranked among the top four stations in a DMA, based on the most recent all-day (9 a.m.-midnight) audience share, as measured by Nielsen Media Research or by any comparable professional, accepted audience ratings service. Defining Top Four stations in this manner is consistent with our local television ownership rule.[100]

C. Prohibited Practices

27. For the purpose of applying the rule barring joint negotiation, we define "joint negotiation" to encompass specified coordinated activities relating to retransmission consent between or among separately owned Top Four stations serving the same DMA. In the NPRM, we sought comment on "whether it should be a *per se* violation for a station to grant another station or station group the right to negotiate or the power to approve its retransmission consent agreement when the stations are not commonly owned."[101] We agree with parties asserting that a prohibition on joint negotiation must be crafted broadly enough to target collusive behavior effectively.[102] For example, ACA argues that, although much of the existing coordination occurs among broadcast stations under the rubric of formal agreements, a prohibition should apply not only to agreements that are legally binding, but also to less formal methods of coordination, *e.g.*, where broadcasters communicate with each other and follow a collective course of action that maximizes their joint profits, but where the arrangement is not enforceable through a legally binding agreement.[103] We share ACA's concern that, even if coordination is currently accomplished largely through legally binding agreements, broadcast stations could readily switch to non-binding forms of collaboration if a rule prohibited only those that were legally binding.[104] Thus, consistent with antitrust precedent and ACA's suggestions,[105] we conclude that joint negotiation includes the following activities:

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consent in good faith); DIRECTV Dec. 6, 2013 *Ex Parte* Letter at 1 (listing the number of DMAs where stations are under common ownership or control); TWC Comments at 37 n.97 (asserting that stations in a given DMA compete directly with one another for the sale of retransmission consent).

[100] *See* 47 C.F.R. § 73.3555(b)(1)(i).

[101] *See NPRM*, 26 FCC Rcd at 2731, ¶ 23. The Commission noted that such consent might be reflected in local marketing agreements ("LMAs"), Joint Sales Agreements ("JSAs"), shared services agreements, or other similar agreements. *Id.*

[102] *See* ACA Comments at 22-24, Appendix A at 14-16; ACA Reply at 39-40. *See also* Comments of Mediacom *et al.* at 19-20.

[103] *See* ACA Reply at 39-40; *See also* Letter of Barbara S. Esbin, Counsel to the American Cable Association, to Marlene H. Dortch, Secretary, FCC, at 2 (Nov. 3, 2011) ("ACA Nov. 3, 2011 *Ex Parte* Letter") ("[T]he proposed rule, by targeting only legally binding agreements for coordinated negotiations, would miss several common forms of collusion among competitors in a market that are recognized by antitrust authorities as unlawful, including the sharing of pricing information among competing sellers and nominally separate negotiations that are nonetheless coordinated through non-legally binding agreement to prevent striking a deal until both sellers are satisfied.").

[104] *See* Rogerson Coordinated Negotiation Analysis at 5.

[105] The Commission also has recognized that collusive behavior can take various forms and is not limited to formal agreements between or among market participants. *See Review of the Prime Time Access Rule, Section 73.658(K) of the Commission's Rules,* Report and Order, 11 FCC Rcd 546, 557, ¶ 24 n.43 (1995) ("Acting together is sometimes referred to as collusion or coordination. Collusion or coordination can be explicit, *e.g.*, meetings of business executives to strike bargains face-to-face, or implicit, *e.g.*, a firm, without explicitly communicating with other firms, increases its price in line with a price increase above the competitive level announced by the market leader."); *Amendment of Part 73 of the Commission's Rules Concerning the Filing of Television Network Affiliation Contracts*, Notice of Proposed Rulemaking, 10 FCC Rcd 5677, 5680, ¶ 15 n.31 (1995), *citing* N.R. Prance, Price Data Dissemination as a *Per se* Violation of the Sherman Act, 45 U. Pitt. L. Rev. (1983) at 68–78 and Donald S. Clark, Price–Fixing without Collusion: An Antitrust Analysis of Facilitating Practices after Ethyl Corp., 1983 Wis. L. Rev. 887, 900–901 ("[D]ata dissemination among competitors may facilitate cartel-like behavior. . . . The
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(i) delegation of authority to negotiate or approve a retransmission consent agreement by one Top Four broadcast television station (or its representative) to another such station (or its representative) that is not commonly owned and that serves the same DMA;

(ii) delegation of authority to negotiate or approve a retransmission consent agreement by two or more Top Four broadcast television stations that are not commonly owned and that serve the same DMA (or their representatives) to a common third party;

(iii) any informal, formal, tacit or other agreement and/or conduct that signals or is designed to facilitate collusion regarding retransmission terms or agreements between or among Top Four broadcast television stations that are not commonly owned and that serve the same DMA. This provision shall not be interpreted to apply to disclosures otherwise required by law or authorized under a Commission or judicial protective order.

28. We believe that defining joint negotiation to encompass the practices above likely would cover all forms of joint negotiation agreements, whether legally binding or not.[106] We note that the Commission, in another context, has adopted anti-collusion rules that proscribe a variety of coordinated activities, not merely those resulting from binding contracts.[107] Although the criteria we adopt for defining joint negotiation are similar to those proposed by ACA, we find the fourth prong of ACA's proposed language to be overly broad in that it could be read to cover legally required disclosures and disclosures of information that is not competitively sensitive and would not facilitate collusion on the terms of retransmission consent. Instead, we adopt the third category of proscribed activities noted above relating to covert collaboration such as price signaling, which deviates from ACA's proposal, and which generally is consistent with antitrust precedent.[108] Moreover, our definition of joint negotiation generally is consistent with the *Texas Television* decision, in which the court imposed restrictions on the defendant stations that were similarly broad in scope.[109] No party in this proceeding specifically addressed the merits of ACA's proposed list of prohibited activities or suggested alternative criteria.[110]

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exchange of cost, price or other data reduces a firm's uncertainty about rivals' likely or actual behavior [and] may facilitate the achievement of a consensus on price and output levels, and increase confidence that the consensus can be and is being maintained. . . .").

[106] *See* Letter from Barbara S. Esbin, Counsel to the American Cable Association, to Marlene H. Dortch, Secretary, FCC, at 7 (Aug. 3, 2011).

[107] In implementing Section 309(j) of the Act governing the use of competitive bidding in license applications, the Commission adopted anti-collusion rules that prohibit certain communications between applicants in the same geographic license area during Commission-conducted auctions. *See* 47 C.F.R. § 1.2105(a)(2)(viii) (barring applicants for licenses in any of the same geographic license areas from "cooperating or collaborating with respect to, discussing with each other, or disclosing to each other in any manner the substance of their own, or each other's, or any other competing applicants' bids or bidding strategies, or discussing or negotiating settlement agreements," except under certain conditions). In adopting these anti-collusion rules, the Commission stated that antitrust law also would apply to prevent collusive behavior during the auction process. *See Implementation of Section 309 of the Communications Act – Competitive Bidding*, Fourth Memorandum Opinion and Order, 9 FCC Rcd 6858, ¶ 59 n.125 (1994) ("Of course, applicants will also be subject to existing antitrust laws. For example, we would expect that this would prohibit discussions with respect to bid prices between any applicants who have applied for licenses in the same geographic market. . . . In addition, agreements between two or more actual or potential competitors to submit collusive, non-competitive or rigged bids are *per se* violations of Section 1 of the Sherman Antitrust Act. . . .").

[108] *See, e.g., In the Matter of Sigma Corp.*, WL 1435989 FTC at *11 (2012); *In the Matter of Bosley, Inc.*, WL 2637641 FTC at *5 (2013); *N.C. State Bd. of Dental Exam'rs v. FTC*, 717 F.3d 359, 373-74 (4th Cir. 2013). *See also* Maurice E. Stucke, *Evaluating the Risks of Increased Price Transparency*, 19-SPG Antitrust 81, 83-84 (2005).

[109] In particular, the court prohibited each defendant from: (1) directly or indirectly entering into, adhering to, maintaining, soliciting, or knowingly performing any act in furtherance of any contract, agreement, understanding or plan with any television broadcaster not affiliated with that defendant relating to retransmission consent or retransmission consent negotiations; (2) directly or indirectly communicating to any television broadcaster not

(continued….)

D. Authority to Adopt the Prohibition on Joint Negotiation

29. We conclude that we are authorized under Section 325 of the Act to adopt a rule barring joint negotiation by separately owned Top Four stations serving the same market. Some commenters assert that the Commission lacks authority to adopt a rule barring joint negotiation and that such a prohibition is inconsistent with congressional intent. For example, NAB argues that, when Section 325 was enacted, operating agreements among separately owned broadcast stations were commonplace.[111] According to NAB, the fact that Congress declined to establish any limitations on the number of markets, systems, stations or programming streams that could be addressed simultaneously in retransmission consent negotiations evinces its intent to permit joint negotiation.[112] LIN points to language in Section 325's legislative history that provides that "[i]t is the Committee's intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals; it is not the Committee's intention . . . to dictate the outcome of the ensuing marketplace negotiations," as evincing Congress's intent not to bar joint negotiation.[113] Some parties assert that restricting joint negotiation would impose a bargaining limitation on broadcasters while allowing MVPDs to enter into similar relationships, and thus would be at odds with Congress's desire to make the good faith bargaining obligations reciprocal.[114]

30. We find these arguments to be unpersuasive. As noted above, Section 325(b)(3)(A) of the Act directs the Commission "to establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent."[115] We conclude that this provision grants the Commission authority to adopt rules governing retransmission consent negotiations, including the rule barring joint negotiation we adopt in this *Order*. Moreover, we conclude that Section 325(b)(3)(C)(ii) of the Act provides an independent statutory basis for our rule. As noted, Section 325(b)(3)(C)(ii) directs the Commission to adopt rules that "prohibit a television broadcast station that provides retransmission

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affiliated with that defendant: (i) any information relating to retransmission consent or retransmission consent negotiations, including, but not limited to, the negotiating strategy of any television broadcaster, or the type or value of any consideration sought by any television broadcaster; or (ii) any information relating to the negotiating strategy of any television broadcaster, or to the type or value of any consideration sought by any television broadcaster relating to any actual or proposed transaction with any MVPD. *See* Final Judgment, *U.S. v. Texas Television, Inc., Gulf Coast Broadcasting Company, and K-Six Television, Inc.,* Civil Action No. C-96-64 (S.D. Texas, 1996) at 2, *available at* http://www.justice.gov/atr/cases/f0700/0748.htm.

[110] A few parties, however, generally supported ACA's proposed list of prohibited activities. *See, e.g.,* Letter from Colleen Abdoulah, CEO and Chairwoman of WideOpenWest Finance, LLC, *et al.* to Julius Genachowski, Chairman, FCC, at 2 n.2 (Feb. 4, 2013) ("Twenty-Five Smaller MVPDs Feb. 4, 2013 *Ex Parte* Letter"); Letter from Mike Chappell, American Television Alliance, to Marlene H. Dortch, Secretary, FCC, at Attachment, ¶ 4 (Nov. 18, 2011) ("ATA Nov. 18, 2011 *Ex Parte* Letter").

[111] *See* NAB Comments at 24-25.

[112] *Id.*

[113] *See* LIN Comments at 20 (citing S. Rep. No. 102-92 at 36). *See also* Journal Reply at 5 ("the Commission lacks the authority to involve itself in the substance of retransmission consent negotiations, and the proposed rule regarding joint negotiations would do just that"); Sinclair Comments at 26 (arguing that prohibiting joint negotiation would be "inconsistent with the purpose of the good faith obligation, which is simply to ensure that the parties bargain with a good faith intention of reaching a deal").

[114] *See* Sinclair Comments at 26; Letter from Barry M. Faber, Executive Vice President and General Counsel of Sinclair Broadcast Group, to Marlene H. Dortch, Secretary, FCC, at 3 (Apr. 4, 2012) ("Sinclair Apr. 4, 2012 *Ex Parte* Letter"); Journal Reply at 5 ("[T]he proposed requirement would not apply equally to broadcasters and MVPDs and would therefore be contrary to the statutory intent that the good faith bargaining obligation be reciprocal."). *See also* Belo Comments at 23; Joint Broadcasters Comments at 22; LIN Comments at 19; NAB Comments at 33; NBC Affiliates Comments at 19; Joint Broadcasters Reply at 6; NAB Reply at 50.

[115] 47 U.S.C. § 325(b)(3)(A).

consent from . . . failing to negotiate in good faith," and provides that "it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations."[116] Because, as discussed above, joint negotiation undermines competition among Top Four, same market broadcast stations that otherwise would compete for carriage on MVPD systems, the terms and conditions resulting from such negotiation are not based on competitive marketplace considerations. Accordingly, we find that adopting a rule barring such practices is well within our authority under this provision.

31. We find nothing in the legislative history of Section 325 to support assertions that the Commission lacks authority to establish rules prohibiting joint negotiation. First, even if we were to credit NAB's assertion that Congress was aware of sharing agreements (including those providing for joint negotiation) when it enacted Section 325, we are not persuaded that Congress's decision not to expressly bar such agreements in the statute indicates that it intended to require the Commission to permit them. Where, as here, Congress has granted the Commission broad discretion to adopt rules implementing Section 325, including rules defining the scope of the good faith obligation, we find it reasonable to conclude that Congress did not identify in the statute every practice or arrangement that might violate that obligation, and instead relied on the Commission to make such determinations.

32. Contrary to the assertions of LIN and Journal, we also do not believe that establishing a rule addressing joint negotiation by Top Four stations is inconsistent with Congress's desire in Section 325 merely to establish a marketplace for the rights to retransmit broadcast signals.[117] Rather, we believe that Congress's goal of a competitive marketplace is directly furthered by this rule, which is precisely designed to prevent a Top Four television broadcast station from obtaining undue leverage in its retransmission consent negotiations by virtue of an arrangement with a competing Top Four station. Thus, rather than "dictating the outcome"[118] of the negotiation, our rule simply addresses the process of retransmission consent negotiations in a manner that protects the competitive working of the marketplace in which retransmission consent is negotiated. The rule neither compels negotiating parties to reach agreement nor prescribes the terms and conditions under which MVPDs may retransmit broadcast signals.

33. We disagree with assertions that prohibiting joint negotiation by broadcasters without addressing joint negotiation by MVPDs is inconsistent with Congress's decision to impose a good faith bargaining obligation on both broadcast stations and MVPDs.[119] MVPDs are obligated by the statute to negotiate retransmission consent in good faith. Where MVPDs that serve the same geographic market jointly negotiate for the right to retransmit broadcast signals, they may be subject to a complaint under the totality of circumstances test for a violation of that reciprocal duty and we may give close scrutiny to such joint negotiation. But although some commenters have provided anecdotal evidence of joint negotiation by MVPDs,[120] the record does not establish that this is a widespread practice or the extent to which such joint negotiation affects retransmission consent fees obtained by broadcasters. Therefore, we decline to address at this time whether joint negotiation by same market MVPDs should be considered a violation of

[116] 47 U.S.C. § 325(b)(3)(C)(ii).

[117] *See* S. Rep. No. 102-92 at 36 ("It is the Committee's intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals; it is not the Committee's intention . . . to dictate the outcome of the ensuing marketplace negotiations.").

[118] *Id.*

[119] *See* Sinclair Comments at 26. *See also* Belo Comments at 23; Joint Broadcasters Comments at 22; LIN Comments at 19; NAB Comments at 33; NBC Affiliates Comments at 19; Joint Broadcasters Reply at 6; NAB Reply at 50.

[120] *See* NAB Reply at 50 (stating that Time Warner Cable "routinely" negotiates retransmission consent jointly on behalf of it and Bright House Networks); *see also* NAB Supplemental Comments at 14.

the duty to negotiate retransmission consent in good faith.[121] Of course, should circumstances warrant, this issue can be considered by the Commission in the future as it protects and promotes competition.

E. Effect on Existing Agreements

34. We conclude that Top Four stations subject to the rule prohibiting joint negotiation are barred from engaging in such negotiation as of the effective date of the rules we adopt in this *Order*, regardless of whether the stations are subject to existing agreements, formal or informal, written or oral, that obligate them to negotiate retransmission consent jointly.[122] On the other hand, the rule does not apply to joint negotiation by same market, separately owned Top Four stations that has been completed prior to the effective date of the rules, and it does not invalidate retransmission consent agreements concluded through such negotiation. Thus, an MVPD that files a complaint pursuant to the rule would need to demonstrate that the alleged good faith violation occurred after the effective date of the rule. Applying the rule to existing agreements in this limited manner is not impermissibly retroactive because, simply put, the rule has no retroactive effect.[123] Given the potential harm to competition and consumers that we have found stems from joint negotiation, we find that the public interest will be served by barring enforcement of agreements to negotiate jointly between or among separately owned Top Four stations serving the same DMA as of the effective date of rules adopted in this *Order*. As we have noted in other contexts, the law affords us broad authority to establish new rules prohibiting future conduct, including conduct pursuant to a pre-existing contract, where the public interest so requires.[124]

[121] *See U.S. Cellular Corp. v. FCC*, 254 F.3d 78, 86 (D.C. Cir. 2001) ("agencies need not address all problems in one fell swoop") (citations and internal quotation marks omitted); *Personal Watercraft Industry Assoc. v. Dept. of Commerce*, 48 F.3d 540, 544 (D.C. Cir. 1995) ("An agency does not have to 'make progress on every front before it can make progress on any front.'") (quoting *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 434 (1993)); *National Association of Broadcasters v. FCC*, 740 F.2d 1190, 1207 (D.C. Cir. 1984) ("[A]gencies, while entitled to less deference than Congress, nonetheless need not deal in one fell swoop with the entire breadth of a novel development; instead, 'reform may take place one step at a time, addressing itself to the phase of the problem which seems most acute to the [regulatory] mind."') (citations and internal quotation marks omitted, alteration in original).

[122] Although we sought comment in the *NPRM* on whether to bar enforcement of existing contract terms that provide for joint negotiation, *see NPRM* at ¶ 23, no party responded specifically to this question. Nonetheless, we address this issue to provide guidance on the interplay of existing agreements to negotiate jointly and the rules we adopt today. We note that ACA has asserted that to the extent the Commission adopts a rule regarding the practice of joint negotiation of retransmission consent, "at a minimum, [the rule should] take effect well before negotiations begin for retransmission consent agreements that expire at the end of 2014." *See* Letter from Barbara Esbin, Counsel for ACA, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 09-182, at 2 (Mar. 6, 2014).

[123] *See, e.g., Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 588 (D.C. Cir. 2001) (changing the grace period on auction debt was not impermissibly retroactive where new rule applied to payment delays occurring after the rule's adoption; although it altered the future effect of the initial license issuance, it did not alter past legal consequences); *Bell Atl. Tel. Cos. v. FCC*, 79 F.3d 1195, 1207 (D.C. Cir. 1996) (a regulation that governs future rates "is not made retroactive merely because it draws upon antecedent facts for its operation") (quotations and citations omitted); *see also Landgraf v. USI Film Prods.*, 511 U.S. 244, 269-70 and n. 24 (1994) (a law does not act retrospectively merely because it is applied in a case arising from conduct antedating its enactment or upsets expectations based in prior law; rather, the issue is whether the new provision attaches new legal consequences to events completed before its enactment); *Chemical Waste Mgmt., Inc. v. EPA*, 869 F.2d 1526, 1536 (D.C. Cir. 1989) ("[i]t is often the case that a business will undertake a certain course of conduct based on the current law, and will then find its expectations frustrated when the law changes. This has never been thought to constitute retroactive lawmaking").

[124] *See Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd 20235, ¶ 55 (2007) ("*MDU Order*"); *Rates for Interstate Inmate Calling Services,* Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 14107, ¶ 101 n.365 (2013), citing *Western Union Tel. Co. v. FCC,* 815 F.2d 1495 at 1501 (D.C. Cir. 1987) (citations omitted); *Promotion of Competitive Networks in Local Telecommunications Markets,* 23 FCC Rcd 5385, ¶ 17 (2008); *IDB Mobile Communications, Inc. v. COMSAT Corp.,* 16 FCC Rcd 11474, ¶¶ 14-16 (2001).

35. We conclude that the Takings Clause of the Fifth Amendment presents no obstacle to barring enforcement of existing agreements to negotiate jointly by separately owned Top Four stations that serve the same DMA. First, this action does not involve the permanent condemnation of physical property and thus does not constitute a *per se* taking.[125]

36. It also is not a regulatory taking. The Supreme Court has outlined the framework for evaluating regulatory takings claims as first established in *Penn Central Transportation Co. v. New York City*[126]:

> In all of these cases, we have eschewed the development of any set formula for identifying a 'taking' forbidden by the Fifth Amendment, and have relied instead on ad hoc, factual inquiries into the circumstances of each particular case. To aid in this determination, however, we have identified three factors which have particular significance: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.[127]

The Court has stated that a party challenging the governmental action bears a substantial burden because not every destruction or injury to property that results from economic regulation effects an unconstitutional taking.[128] Rather, a regulation's constitutionality is evaluated "by examining the governmental action's 'justice and fairness.'"[129]

37. The above factors counsel against finding a regulatory taking here. First, prohibiting the enforcement of agreements that contemplate joint negotiation by same market, separately owned Top Four stations would impact those stations economically only by denying them the supra-competitive retransmission consent fees such joint negotiation might yield and whatever efficiencies joint negotiation might entail, which efficiencies we have found would likely be slight. As noted above, the rule we adopt is targeted only at coordinated activities among competitors that we find are harmful to competition and consumers. The fact that regulation might prevent the most profitable use of property is not dispositive of whether such regulation effects an unconstitutional taking.[130] Thus, under the first prong of the takings analysis, any economic impact on stations subject to the rule is outweighed by our public interest objectives of promoting competition in local television markets and protecting consumers.

38. Second, applying the rule only to prohibit future joint negotiation under existing agreements does not improperly interfere with distinct investment-backed expectations. As early as 2000, when the Commission initially adopted rules to implement Section 325(b)(3)(C)(ii) of the Act, it concluded that "[p]roposals that result from agreements not to compete or to fix prices" are "examples of bargaining proposals [that] presumptively are not consistent with competitive marketplace considerations

[125] *See Loretto v. Teleprompter Manhattan City Corp.,* 458 U.S. 419, 427 (1982) ("when faced with a constitutional challenge to a permanent physical occupation of real property, this court has invariably found a taking"); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302, 322 (2002) ("When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner.").

[126] *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 123-128 (1978).

[127] *See MDU Order*, 22 FCC Rcd at 20262, ¶ 56 (quoting *Connolly v. Pension Ben. Guaranty Corp.,* 475 U.S. 211, 224-25 (1986) (citations and internal quotation marks omitted)).

[128] *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 500 (1998).

[129] *See Penn Central,* 438 U.S. at 124, citing *United States v. Causby,* 328 U.S. 256 (1946).

[130] *See Andrus v. Allard,* 444 U.S. 51, 66 (1979) ("[L]oss of future profits-unaccompanied by any physical property restriction-provides a slender reed upon which to rest a takings claim. . . . [P]erhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests.").

and the good faith negotiation requirement."[131] Several years prior to that, DoJ brought its antitrust suit against the top broadcast stations in the Corpus Christi, Texas, market, which led to the settlement in the *Texas Television* decision.[132] In 2010, the Commission, in its Quadrennial Review proceeding, raised questions about the impact of broadcast sharing agreements on retransmission consent negotiations.[133] In 2011, the Commission issued the NPRM in this proceeding, which proposed to adopt a prohibition targeted specifically at joint negotiation of retransmission consent.[134] Thus, for many years now, stations subject to the rule prohibiting joint negotiation have been on notice that coordinated negotiation of retransmission consent is of concern to the Commission, and that any related investments had the potential to be affected by rules addressing such conduct. More fundamentally, the provisions of Section 325 signal Congress's express authorization for the Commission to scrutinize marketplace conduct and adopt proscriptive rules to safeguard competition in the marketplace. Consistent with our finding in *MDU Order*, we conclude that stations subject to the rule do not have a legitimate investment-backed expectation in profits to be obtained from future anticompetitive behavior.[135] We thus believe that any investment-backed expectations that same market, separately owned Top Four stations may have had are unreasonable and do not satisfy the second prong of the test above.

39. Finally, with respect to the character of governmental action, the rule we adopt in this *Order* substantially advances the legitimate government interests in preserving competition in local television markets and preventing supra-competitive increases in retransmission consent fees. The rule proscribing joint negotiation also advances Congress's statutory objective to ensure that any terms and conditions for retransmission consent are "based on competitive marketplace considerations."[136] As noted above, the rule is grounded in our assessment of the relative harms and benefits of agreements among Top Four stations in the same market that provide for joint negotiation and is carefully tailored to promote Congress's objectives in Section 325.

IV. FURTHER NOTICE OF PROPOSED RULEMAKING

40. We are issuing this *FNPRM* to solicit additional comment on whether we should eliminate or modify our network non-duplication and syndicated exclusivity rules. We received numerous comments on this issue in response to the *NPRM*. However, the record developed in this proceeding to date is not sufficient for us to yet make a determination whether the exclusivity rules are still needed in today's competitive video marketplace or to assess the potential impact on affected parties of eliminating these rules. Given the complex issues involved, we believe it is necessary and appropriate to undertake a more comprehensive review of the exclusivity rules and to compile a more complete record.

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[131] *See Good Faith Order*, 15 FCC Rcd at 5470, ¶ 58.

[132] *See* Final Judgment, *U.S. v. Texas Television, Inc., Gulf Coast Broadcasting Company, and K-Six Television, Inc.,* Civil Action No. C-96-64 (S.D. Texas, 1996), *available at* http://www.justice.gov/atr/cases/f0700/0748.htm.

[133] *See 2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, 26 FCC Rcd 17489, ¶¶ 200, 203, 207 (2011).

[134] *See NPRM*, 26 FCC Rcd at 2731, ¶ 23.

[135] *See MDU Order,* 22 FCC Rcd at 20263, n.182 (citing *Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973)) (antitrust law proscribing monopolies "assumes that an enterprise will protect itself against loss by operating with superior service, lower costs, and improved efficiency," and a monopolist may not "substitute for competition anticompetitive uses of its dominant power"); *Delaware & Hudson Ry. Co. v. Consolidated Rail Corp*., 902 F.2d 174, 178 (2d Cir. 1990) ("A monopolist cannot escape liability for conduct that is otherwise actionable simply because that conduct also provides short-term profits.").

[136] 47 U.S.C. § 325(b)(3)(C)(ii).

A. Background

41. A broadcaster may carry network and syndicated programming on its local television station(s) only with the permission of the networks or syndicators that own or hold the rights to that programming, as reflected in network/affiliate agreements or syndication agreements.[137] In addition, the ability of broadcasters to grant retransmission consent for MVPD carriage may be constrained by the network/affiliate agreement or by the syndication agreement because such agreements generally limit the geographical area in which the station holds exclusive rights to network or syndicated programming. The Commission's network non-duplication and syndicated exclusivity rules are designed to serve as a means of enforcing contractual exclusivity agreements entered into between broadcasters, which purchase the distribution rights to programming, and networks and syndicators, which supply the programming.[138] Thus, the network non-duplication and syndicated exclusivity rules require that the broadcaster have contractual exclusivity rights and provide proper notice to the relevant MVPD, requesting that an MVPD delete duplicative network or syndicated programming.[139] The rules may be invoked by stations that elect retransmission consent in their local markets, even if they are not actually carried by the MVPD, to prevent an MVPD from carrying programming of a distant station that duplicates local broadcast station programming.[140] By requiring MVPDs to delete duplicative network or syndicated programming carried on any distant signals they import into a local market, the Commission's network non-duplication and syndicated exclusivity rules provide an extra-contractual mechanism for broadcasters to enforce their contractual exclusivity rights against MVPDs, which are not parties to those exclusivity agreements.

1. Network Non-Duplication

42. The network non-duplication rules protect a local commercial or non-commercial broadcast television station's right to be the exclusive distributor of network programming within a specified zone, and require programming subject to the rules to be blacked out on request when carried on another station's signal imported by an MVPD into the local station's zone of protection.[141] A television station's rights under the network non-duplication rules are governed by the terms of the contractual agreement between the station and the holder of the rights to the program. The Commission's rules allow commercial and non-commercial television stations to protect the exclusive distribution rights they have negotiated with broadcast networks, not to exceed a specified geographic zone of 35 miles (55 miles for network programming in smaller markets).[142] For purposes of these rules, it is these specified zones that distinguish between "local" and "distant."[143]

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[137] A network program is "any program delivered simultaneously to more than one broadcast station regional or national, commercial or noncommercial." 47 C.F.R. § 76.5(m). A syndicated program is "any program sold, licensed, distributed, or offered to television station licensees in more than one market within the United States other than as network programming as defined in § 76.5(m)." *Id.* § 76.5(ii).

[138] *Amendment of Parts 73 and 76 of the Commission's Rules Related to Program Exclusivity in the Cable and Broadcast Industries*, 3 FCC Rcd 5299, 5316, 5319, ¶¶ 104, 118 (1988) ("*1988 Program Exclusivity Order*"), *recon. denied in pertinent part*, *Memorandum Opinion and Order,* 4 FCC Rcd 2711 (1989) ("*1989 Program Exclusivity Order*"), *aff'd sub nom. United Video, Inc. v. FCC*, 890 F. 2d 1173 (D.C. Cir. 1989) (*"United Video*").

[139] 47 C.F.R. §§ 76.93, 76.103, 76.122(b), 76.123(b)-(c), 76.124.

[140] For example, an in-market station that fails to reach agreement for retransmission consent and subsequently refuses to permit a cable system or other MVPD to carry its signal can still invoke the network non-duplication and syndicated exclusivity rules to require the blackout, in market, of programming that would otherwise be provided by the in-market station.

[141] *See* 47 C.F.R. §§ 76.92 and 76.122. In addition to full power television stations, 100-watt translator stations are allowed to demand network non-duplication protection under certain circumstances. *See id.* § 76.92(d).

[142] *See id.* §§ 76.92 and 76.120. Section 76.51 of the rules lists the top 100 television markets. A station licensed to a hyphenated television market (i.e., a television market that includes more than one city, such as Dallas-Fort Worth, Texas), as defined in section 76.51, is entitled to assert exclusivity, under the network non-duplication rule, within

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43. *Cable*. Network non-duplication rules for cable were first promulgated by the Commission in 1965.[144] Throughout the 1960s and 1970s the Commission continually refined the rules, but the policy behind them remained the same.[145] The purpose of the rules was to protect the exclusive contractual rights of local broadcasters in network programming from the importation of non-local network stations by cable systems, thereby protecting local stations from what was perceived as the potential harm from the growth of cable systems.[146] In this regard, the Commission was concerned that because broadcasters and cable systems were on an unequal footing with respect to the market for programming, a cable system's duplication of local programming via the signals of distant stations was not a fair method of competition with broadcasters.[147] Prior to 1988, network non-duplication protection

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35 miles surrounding each named city. *Id.* §76.51. The 35 mile specified zone, as well as all other mileage zones, used in applying the exclusivity rules, is measured from the relevant station's "reference point" in its community of license. The rules provide a list of the reference points to identify television market boundaries used for this purpose. *See id.* § 76.53. The same reference point applies to all stations licensed to the same community regardless of where their transmitters or studios are located. The relevant specified zone is not coterminous with the DMA to which the station is designated and is frequently smaller.

[143] Put another way, a "distant" station is a station not assigned to the local station's DMA (i.e., an "out-of-market" station).

[144] *See Amendment of Subpart L, Part 11, to Adopt Rules and Regulations to Govern the Grant of Authorizations in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems et. al*, First Report and Order, 38 FCC 683 (1965) ("*1965 Network Exclusivity Order*") (implementing the first non-duplication rules for cable television).

[145] *See id*. *See also Amendment of Subpart L, Part 11, to Adopt Rules and Regulations to Govern the Grant of Authorizations in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems et. al*, Second Report and Order, 2 FCC 2d 725, 747-56 , ¶ 51-74 (1966) ("*1966 Network Exclusivity Order*") (modifying the non-duplication rule, shortening the time period of non-duplication to one day); *Amendment of Subpart F of Part 76 of the Commission's Rules and Regulations With Respect to Network Program Exclusivity Protection by Cable Television Systems, Amendment of Section 74.1103 of the Commission's Rules and Regulations as it Relates to CATV Systems with Fewer than 500 Subscribers*, First Report and Order, 52 FCC 2d 519, 549, ¶ 71 (1975) ("*1975 Network Exclusivity Order*") (exempting cable providers with fewer than 1,000 subscribers from network non-duplication requirements); *Amendment of Subpart F of Part 76 of the Commission's Rules and Regulations With Respect to Network Program Exclusivity Protection by Cable Television Systems,* Memorandum Opinion and Order, 67 FCC 2d 1303, 1305, ¶ 9 (1978) ("*1978 Network Exclusivity Order*") (exempting significantly viewed channels from being blacked out under network non-duplication rules);*1989 Program Exclusivity Order,* 4 FCC Rcd at 2726-27, ¶¶ 82-85 (modifying the notice requirement for network non-duplication)

[146] *See 1975 Network Exclusivity Order*, 52 FCC 2d at 520, ¶ 2 (stating that the program exclusivity rules were adopted "[t]o equalize the conditions under which cable systems and broadcasters competed, and to ameliorate the risk that cable television would have a future adverse economic impact on television broadcasting service"); *Amendment of Subpart F of Part 76 of the Commission's Rules and Regulations With Respect to Network Program Exclusivity Protection by Cable Television Systems*, Notice of Inquiry and Proposed Rulemaking, 46 FCC 2d 1164, 1164, ¶ 3 (1974) ("*1974 Network Exclusivity NOI/NPRM*") ("The primary purpose of network program exclusivity has been to prevent the erosion or fractionalization of local television station audiences which could precipitate a substantial decrease in the advertising revenues of local stations and, thereby, threaten their continued economic viability."); *1965 Network Exclusivity Order*, 38 FCC at 713, ¶ 76 (finding that "requirements of carriage and reasonable nonduplication are appropriate as means designed to create reasonably fair and open conditions for competition between CATV and broadcasting stations as alternative ways of making television programs available to the public.").

[147]*See 1965 Network Exclusivity Order*, 38 FCC at 705, ¶ 57. As the Commission explained, television stations obtain most of their programs from various program suppliers. Stations obtain the right to exhibit network programs by offering to the network attractive audience circulation and by giving up to the network a major portion of the compensation which the sponsor or participating advertiser pays for the use of the station's facilities in connection with that program. Stations typically obtain the right to exhibit non-network programs by making payments to non-

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applied only to programming being broadcast simultaneously in the local market by a distant signal.[148] In 1988, the Commission modified the rule to extend exclusivity protection to any time period specified in the contractual agreement between the network and the affiliate.[149]

44. The Commission's rules contain several exceptions to application of the network non-duplication rules. First, because of the cost of the equipment necessary to delete programming, the Commission exempts cable systems having fewer than 1,000 subscribers.[150] The rule also does not apply if the out-of-market station's signal is deemed "significantly viewed" in a relevant community.[151] This latter exception was intended to prevent the deletion of programs on stations which the viewers could receive off-the-air.[152]

45. *Satellite.* The Satellite Home Viewer Improvement Act of 1999 ("SHVIA")[153] directed the Commission to apply the cable network non-duplication rules to direct broadcast satellite ("DBS"), but only with respect to the retransmission of nationally distributed superstations.[154] These nationally

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network program suppliers. Program suppliers generally grant stations the exclusive right to exhibit programs within a particular geographical area and for a particular length of time, based on the view that duplication of the program within the station's market reduces the audience and the value of the program to the station. By contrast, the Commission said, CATV systems are not required to enter the program distribution market at all. They do not compete for network affiliation or for access to syndicated programming, and they are not concerned with bidding against competing broadcasters for the right to exhibit these programs or with bargaining with program suppliers for time and territorial exclusivity. *See id.* at 703-4, ¶¶ 52-55.

[148] *Amendment of Parts 73 and 76 of the Commission's Rules Related to Program Exclusivity in the Cable and Broadcast Industries*, 3 FCC Rcd 6171 (1988) ("*1988 Program Exclusivity FNPRM*").

[149] 3 FCC Rcd 5299, 5314 ¶ 92 (1988) ("*1988 Program Exclusivity Order*"); 47 C.F.R. §§ 76.92 and 76.93.

[150] *See* 47 C.F.R. § 76.95(a); *see also 1988 Program Exclusivity Order*, 3 FCC Rcd at 5314, ¶ 94.

[151] *See* 47 C.F.R. § 76.92(f); *see also id.* § 76.54 (defining "significantly viewed"). In 1972, the Commission established a list of significantly viewed stations based on surveys for the periods May 1970, November 1970, and February/March 1971. *See Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems*, Memorandum Opinion and Order on Reconsideration, 36 FCC 2d 326, 347, ¶ 55 & Appendix B (1972). Section 76.54(d) of the Commission's rules allows television broadcast stations not encompassed by the surveys (*i.e.*, not on-the-air at the time the surveys were taken) to demonstrate "significantly viewed status on a county-wide basis by independent professional audience surveys which cover three separate, consecutive four-week periods" during the first three years of the station's operation, which are comparable to the surveys used in compiling Appendix B. 47 C.F.R. § 76.54(d). Alternatively, stations may seek to establish significantly viewed status on an individual community or system-wide basis, pursuant to Section 76.54(b) of the rules. *Id.* § 76.54(b). The Commission maintains an updated list of significantly viewed stations on its website. *See* http://www.fcc.gov/mb/.

[152] *See, e.g., 1965 Network Exclusivity Order,* 38 FCC at 720, ¶ 97-98 ("Our purpose was and is to preserve the existing off-the-air situation, insofar as exclusivity is concerned, and not to give stations any greater exclusivity vis-a-vis CATV systems than they now enjoy as against each other."); *1978 Network Exclusivity Order,* 67 FCC 2d at 1304, ¶ 6.

[153] SHVIA was enacted as Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999 (relating to copyright licensing and carriage of broadcast signals by satellite carriers, codified in scattered sections of 17 and 47 U.S.C.), P.L. No. 106-113, 113 Stat. 1501, Appendix I (1999). SHVIA extended the statutory copyright licenses for satellite carriage of distant broadcast stations originally granted by Congress in 1988. The Satellite Television Extension and Localism Act of 2010 ("STELA"), the most recent extension of the statutory copyright licenses for satellite carriage of distant broadcast stations, will expire on December 31, 2014, absent reauthorization by Congress. *See* Pub. L. 111-175, 124 Stat. 1218 (2010).

[154] 47 U.S.C. § 339(b). A "nationally distributed superstation" is defined as a television broadcast station, licensed by the Commission, that: (1) is not owned or operated by or affiliated with a television network that, as of January 1, 1995, offered interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated television licensees in 10 or more states; (2) on May 1, 1991, was retransmitted by a satellite carrier and

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distributed superstations may be offered to any satellite subscriber, without the "unserved household" restriction that applies to other distant network stations.[155] SHVIA directed the Commission to implement new exclusivity rules for satellite that would be "as similar as possible" to the rules applicable to cable operators.[156] In general, the network non-duplication rules apply when a satellite carrier retransmits a nationally distributed superstation to a household within a local broadcaster's zone of protection[157] and the nationally distributed superstation carries a program to which the local station has exclusive rights.[158] In contrast to the mileage-based specified zones used in the cable context, zip codes are used to determine the areas to which the zone of protection applies for satellite carriers.[159] As in the cable context, the broadcast station licensees may exercise their network non-duplication rights in accordance with the terms specified in a contractual agreement between the network and its affiliate within the zone of protection.[160] The rules for satellite carriers also have exceptions for significantly viewed stations and for areas in which the satellite carrier has fewer than 1,000 subscribers in a protected zone.[161]

46. *Open Video Systems*. The Telecommunications Act of 1996 (the "1996 Act") established the open video system as a new framework for entry into the video programming distribution market.[162] Congress's intent in establishing the open video system framework was "to encourage telephone companies to enter the video programming distribution market and to deploy open video systems in order to 'introduce vigorous competition in entertainment and information markets' by providing a competitive alternative to the incumbent cable operator."[163] As an incentive for telephone company entry into the video programming distribution market, the 1996 Act provides for reduced regulatory burdens for open video systems subject to the systems' compliance with certain non-discrimination and other requirements.[164] However, the 1996 Act directed the Commission to extend its network non-duplication

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was not a network station at that time; and (3) was, as of July 1, 1998, retransmitted by a satellite carrier under the statutory license of section 119 of title 17, United States Code. *Id.* § 339(d)(2). There are only six television broadcast stations that meet the foregoing three criteria: KTLA-TV (Los Angeles), WPIX-TV (New York), KWGN-TV (Denver), WSBK-TV (Boston), WWOR-TV (New York) and WGN-TV (Chicago). *See Satellite Exclusivity Order*, 15 FCC Rcd at 21692-93, ¶¶ 9-10. "Nationally distributed superstations" are a subset of "superstations." *See* 47 C.F.R. §§ 76.122 and 76.123.

[155] Under the "unserved household" restriction, satellite carriers may only deliver distant network stations (other than nationally distributed superstations) to "unserved households," i.e., those households that cannot receive a local affiliate over the air. *See* 17 U.S.C. § 119(a)(2).

[156] *See* Joint Explanatory Statement of the Committee of Conference on H.R. 1554, 106th Cong., 145 Cong. Rec. H11793, H11796 (daily ed. Nov. 9, 1999) (stating that the network nonduplication and syndicated exclusivity rules for satellite carriers "should be as similar as possible to [the rules] applicable to cable services"); *see also* 47 C.F.R. § 76.122 (setting out the network non-duplication rules as they apply to DBS providers).

[157] The "zone of protection" for satellite carriers is defined in 47 C.F.R. § 76.120(e).

[158] *Id.* § 76.122(a).

[159] *Id.*; *see also Satellite Exclusivity Order*, 15 FCC Rcd at 21703, ¶ 28. While there is no readily applicable measure that will precisely match specified zones in either the cable or satellite context, it would be more difficult to determine which satellite subscribers are located within a cable community unit, which is tied to the cable franchise process, than to use zip codes. *Id*.

[160] 47 C.F.R. § 76.122(b). *See also id.* § 76.124, which details the requirements for invoking network non-duplication rights.

[161] *Id.* § 76.122(j), (k)(l).

[162] Telecommunications Act of 1996, Pub. L. No 104-104, 110 Stat. 56 (1996). *See also* 47 U.S.C. § 573.

[163] *Implementation of Section 302 of the Telecommunications Act of 1996,* Second Report and Order, 11 FCC Rcd 18223, 18227, ¶ 2 (1996) ("*OVS Second Report and Order*"), *recon. granted in part, denied in part*, Third Report and Order and Second Order on Reconsideration, 11 FCC Rcd 20227 (1996).

[164] *See id.; see also* 47 U.S.C. § 573(c).

rules to the distribution of video programming over open video systems.[165] Accordingly, the Commission amended its rules in 1996 to directly apply the existing network non-duplication rules to open video systems.[166]

2. Syndicated Exclusivity

47. The syndicated exclusivity rules are similar in operation to the network non-duplication rules, but they apply to exclusive contracts for syndicated programming, rather than for network programming.[167] In addition, the syndicated exclusivity rules apply only to commercial stations. The syndicated exclusivity rules allow a local commercial broadcast television station or other distributor of syndicated programming[168] to protect its exclusive distribution rights within a 35-mile geographic zone surrounding a television station's city of license, although the zone may not be greater than that provided for in the exclusivity contract between the station and syndicator.[169] Unlike the network non-duplication rule, however, the zone of protection is the same for smaller markets as it is for the top-100 markets.[170] With only a few exceptions, a station that has obtained syndicated exclusivity rights in a program may request a cable operator to black out that program as broadcast by any other television station, and may request a satellite operator to provide such protection against any nationally distributed superstation. The cable or satellite system must comply if properly notified in accordance with the rules.[171]

48. *Cable*. The Commission adopted the first syndicated exclusivity rules in 1972, consistent with a "Consensus Agreement" that was negotiated among the cable, broadcast, and program production industries in order to facilitate the passage of copyright legislation.[172] These rules were considered necessary to "protect local broadcasters and to ensure the continued supply of television programming."[173] Shortly after Congress established a copyright compulsory license system in 1976, the Commission began an inquiry to review the "purpose, effect, and desirability of" the syndicated exclusivity rules.[174] In 1979, the Commission adopted the Report on Cable Television Syndicated Exclusivity Rules, which performed a cost-benefit analysis to determine whether retaining the syndicated exclusivity rules would be in the

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[165] *See* 47 U.S.C. § 573(b)(1)(D).

[166] *See OVS Second Report and Order*, 11 FCC Rcd at 18326, ¶ 201; *see also* 47 C.F.R. §§ 76.1508, 76.1509. We note that Section 76.1509 references the cable syndicated exclusivity rules in Sections 76.151 through 76.163, which have been renumbered as Sections 76.101 through 76.110. *See Satellite Exclusivity Order*, 15 FCC Rcd at 21741-42, Appendix B.

[167] *See* 47 C.F.R. §§ 76.101-110, 76.120 and 76.123-125. Translator stations are not entitled to syndicated exclusivity protection.

[168] A distributor of syndicated programming is entitled to exercise exclusive rights to the programming for a period of one year from the initial broadcast syndication licensing of such programming anywhere in the United States, except that distributors are not entitled to exercise such rights in areas in which the programming has already been licensed. *See id.* § 76.103(b).

[169] *See id.* §§ 76.101, 76.103, 76.123(b). The Commission's rules provide such protection within a station's 35-mile geographic zone, which extends from the reference point of the community of license of the television station. *See id.*§§ 76.53, 76.101 Note.

[170] *See id.* § 76.101 Note.

[171] *See id.* §§ 76.101 and 76.123. For the notification requirements, s*ee id.* §§ 76.105, 76.123(d). For cable, the syndicated exclusivity rules provide exceptions for (i) any station whose signal is in the Grade B contour of the station asserting exclusivity; (ii) a "significantly viewed" signal; and (iii) a cable system with fewer than 1,000 subscribers. *Id*. § 76.106. For satellite, the rules also provide exceptions regarding the carriage of programming of any nationally distributed superstation. *See id.* § 76.123 (k)-(m).

[172] *See Cable Television Report and Order,* 36 FCC 2d 143, ¶ 65 (1972).

[173] *Id.* at 169, ¶ 73.

[174] *See Cable Television Syndicated Program Exclusivity Rules*, Notice of Inquiry, 61 FCC 2d 746, 746, ¶ 1 (1976).

public interest.[175] The Commission found that eliminating the rules would have negligible effects on the size of local station audiences and consequently would not significantly harm any broadcaster.[176] The Commission concluded that, when weighed against the minimal negative impact on broadcasters and program supply, the increase in diversity and number of new cable systems that the rules' elimination would allow supported their repeal.[177] Therefore, in 1980, the Commission repealed the syndicated exclusivity rules.[178]

49. In 1988, however, the Commission reversed its decision, finding that the reasoning that shaped the 1980 decision to repeal the syndicated exclusivity rules was flawed in two significant respects.[179] First, the Commission found that its prior inquiry had incorrectly examined the effects of repeal or retention on individual competitors rather than how the competitive process operates.[180] Second, the Commission found that it had failed to analyze the effects on the local television market of denying broadcasters the ability to enter into contracts with enforceable exclusive exhibition rights when they had to compete with cable operators, who could enter into such contracts.[181] The Commission concluded that the absence of syndicated exclusivity rules both hurt the supply of programs to broadcasters and unfairly handicapped competition between broadcasters and cable systems to meet viewers' preferences in the distribution of existing programming.[182] The Commission therefore reinstated its syndicated exclusivity rules.[183]

50. The Commission's current cable syndicated program exclusivity rules allow commercial stations to protect their exclusive distribution rights for syndicated programming against local cable

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[175] *See Cable Television Syndicated Program Exclusivity Rules*, Report, 71 FCC 2d 951 (1979) ("*1979 Syndicated Exclusivity Report*"); *see also Inquiry into the Economic Relationship Between Television Broadcasting and Cable Television*, Report, 71 FCC 2d 632 (1979) ("*1979 Economic Report*").

[176] *See 1979 Syndicated Exclusivity Report*, 71 FCC 2d at 966, ¶ 44.

[177] The Commission found that the syndicated exclusivity rules imposed two significant burdens on the consuming public: a direct loss of programming to cable subscribers, and the loss the public suffers from the impediment that the rules created to the development of new cable systems. *Id.* at 985, ¶ 91. Specifically, the Commission found that the syndicated exclusivity rules "deprive potential subscribers not only of the programming that would be deleted under the rules but of whatever other benefits they might have through access to cable television service" and that "the operation of these rules [therefore] can cause reductions in the demand for cable services which may make cable service unviable or delay its provision to the public." *Id.* at 986, ¶ 93. Thus, it believed that elimination of the rules would support an increase in the diversity and number of new cable systems. *Id.*

[178] *See Cable Television Syndicated Program Exclusivity Rules, Inquiry into the Economic Relationship Between Television Broadcasting and Cable Television*, Report and Order, 79 FCC 2d 663 (1980) ("*1980 Syndicated Exclusivity Order*"). The Commission did not consider repeal of the network non-duplication rules at the time it eliminated the syndicated exclusivity rules. *See id.* at 667-68, ¶ ("In this proceeding we are focusing our attention only on the distant signal and syndicated program exclusivity rules. Changes in the mandatory carriage, sports blackout, and network nonduplication rules have been explicitly excluded from review in this proceeding"); *Cable Television Syndicated Program Exclusivity Rules, Inquiry Into the Economic Relationship Between Television Broadcasting and Cable Television, Notice of Proposed Rulemaking*, 71 FCC2d 1004, 1006, ¶ 5 (1979) ("We do not propose to consider in this proceeding any changes in the network nonduplication, mandatory carriage, or sports blackout rules. Each of these may warrant review on its own merits but since different considerations are involved, we believe it administratively efficient to consider these rules separately.")

[179] *1988 Program Exclusivity Order*, 3 FCC Rcd at 5308-09, ¶¶ 49-55.

[180] *See id.* at 5303, 5308, ¶¶ 23, 49-51.

[181] *See id*. at 5302, 5308-09, ¶¶ 23, 52-55.

[182] *See id.* at 5309, ¶ 55.

[183] The Commission's reinstatement of the syndicated exclusivity rules was affirmed in *United Video, supra* n. 138.

systems in a local market.[184] Distributors of syndicated programming are allowed to seek protection for one year from the initial licensing of such programming anywhere in the United States, except where the relevant programming has already been licensed.[185] The exceptions to application of the syndicated program exclusivity rules are similar to those that apply to the network non-duplication rules. Cable systems with fewer than 1,000 subscribers are exempt because of the cost of the equipment necessary to carry out deletions.[186] The rules also do not apply if the distant station's signal is "significantly viewed" in a relevant cable community.[187] In addition, the syndicated programming of a distant station need not be deleted if that station's Grade B signal encompasses the relevant cable community.[188]

51. *Satellite*. SHVIA directed the Commission to apply its cable syndicated exclusivity rules to DBS providers only with respect to retransmission of nationally distributed superstations.[189] The Commission implemented this using zip codes rather than community units to determine zones of protection.[190] The rules for satellite carriers also provide exceptions for significantly viewed stations and for areas in which the satellite carrier has fewer than 1,000 subscribers in a protected zone.[191]

52. *Open Video Systems*. The 1996 Act also directed the Commission to apply its cable syndicated exclusivity rules to the distribution of video programming over open video systems.[192] The Commission amended its rules in 1996 to apply the existing cable syndicated exclusivity rules directly to open video systems.[193]

3. The Compulsory Copyright License

53. Under the Copyright Act, unlicensed retransmission of the copyrighted material in a broadcast signal constitutes copyright infringement.[194] At the time the Commission initially adopted the exclusivity rules, cable systems were permitted under the Copyright Act to retransmit the signals of broadcast television stations without incurring any copyright liability for the copyrighted programs carried on those signals.[195] In 1976, Congress enacted amendments to the Copyright Act which impose

[184] 47 C.F.R. § 76.101.

[185] *See id.* § 76.103.

[186] *See id.* § 76.106(b). *See also 1988 Program Exclusivity Order*, 3 FCC Rcd at 5314, ¶ 94.

[187] 47 C.F.R. § 76.106(a).

[188] *Id*.

[189] *See* SHVIA § 1008, creating 17 U.S.C. § 339(b).

[190] *See Satellite Exclusivity Order,* 15 FCC Rcd at 21703, ¶ 28.

[191] *See* 47 U.S.C. § 340(e); 47 C.F.R. § 76.123(k), (m).

[192] *See* 47 U.S.C. § 573(b)(1)(D).

[193] *See OVS Second Report and Order*, 11 FCC Rcd at 18326, ¶ 201; *see also* 47 C.F.R. §§ 76.1508, 76.1509. We note that Section 76.1509 references the cable syndicated exclusivity rules in Sections 76.151 through 76.163, which have been renumbered as Sections 76.101 through 76.110. *See Satellite Exclusivity Order*, 15 FCC Rcd at 21741-42, Appendix B.

[194] *See* 17 U.S.C. § 111(b).

[195] *See* The Cable and Satellite Carrier Compulsory Licenses: An Overview and Analysis, A Report of the Register of Copyrights, U.S. Copyright Office (March 1992), at i-iii, available at http://www.copyright.gov/reports/cable-sat-licenses1992.pdf; *see also Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974) (holding that cable systems did not perform copyrighted works within the meaning of the Copyright Act when they retransmitted the programming carried on distant broadcast stations and therefore were not subject to copyright liability for such retransmissions); *Fortnightly Corp. v. United Artists Television. Inc.,* 392 U.S. 390 (1968), *reh'g denied*, 393 U.S. 902 (1968) (holding that cable systems did not perform copyrighted works within the meaning of the Copyright Act when they retransmitted the programming carried on local broadcast signals and therefore were not subject to copyright liability for such retransmissions).

copyright liability on cable systems for retransmission of broadcast signals, but also create a permanent compulsory license under which cable systems may retransmit the signals of all local broadcast stations and distant broadcast stations to the extent that carriage of such distant stations is permitted under FCC rules.[196] In 1988, Congress amended the Copyright Act to create a temporary compulsory license for satellite carriers.[197] In 1999, a new temporary compulsory license was enacted to permit satellite carriers to retransmit the signals of local stations to any subscriber within a station's local market ("local-into-local" service).[198] The temporary compulsory license granted to satellite carriers under the Copyright Act for distant stations is more limited than that granted to cable systems. Satellite carriers may retransmit signals of nationally distributed superstations[199] to any household but may retransmit the signals of distant network stations to subscribers only if local network stations are unavailable to the subscribers as part of a satellite carrier's local-into-local package and over the air, and only to the extent that carriage of such superstations and distant stations is permitted under the FCC rules.[200]

4. Petitions for Rulemaking

54. In 2005, ACA filed a rulemaking petition asserting that broadcasters use exclusivity and network affiliation agreements to extract "supracompetitive prices" for retransmission consent from small companies, and that this practice harms competition and consumers.[201] Similarly, the 2010 Petition argued that the network non-duplication and syndicated exclusivity rules provide broadcasters with a "one-sided level of protection" that is no longer justified.[202] The *NPRM* in this proceeding sought comment on the potential benefits and harms of eliminating the Commission's rules concerning network non-duplication and syndicated programming exclusivity.[203] While the Commission received numerous

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[196] *See* 17 U.S.C. § 111(c). Under the compulsory license, cable systems are not required to obtain the consent of the copyright owners of copyrighted material contained in the broadcast signal being retransmitted or negotiate license fees for the use of such copyrighted material, but, instead, must pay government-established fees for the right to retransmit copyrighted material contained in broadcast programming. *See id.* § 111(d). The 1976 amendments established that fees payable to copyright owners for compulsory licenses would be based on a percentage of each cable system's gross revenues and would be adjusted periodically by the newly formed Copyright Royalty Tribunal. *See id. See also id.* § 801(b).

[197] *See* Satellite Home Viewer Act of 1988 ("SHVA"), Pub. L. No. 100-667, 102 Stat. 3935, Title II (1988) (codified at 17 U.S.C. §§ 111, 119). The temporary compulsory license granted under SHVA has been extended several times. As noted above, the most recent extension will expire on December 31, 2014, absent reauthorization by Congress. *See supra* n.153.

[198] *See* 17 U.S.C. § 122(a) and 47 U.S.C. § 338.

[199] *See supra* n.154 (defining nationally distributed superstation).

[200] *See* 17 U.S.C § 119(a); *see also* 47 U.S.C. § 339. Section 119 imposes additional restrictions and requirements on satellite carriers. *See* 17 U.S.C. § 119(a)(2)(B) ("unserved household" restriction), § 119(a)(2)(C) (submission of subscriber lists to networks). Section 122 also permits satellite carriers to carry out-of-market "significantly viewed" stations under specified circumstances. *See id.* § 122(a)(2).

[201] American Cable Association, Petition for Rulemaking to Amend 47 C.F.R. §§ 76.64, 76.93 and 76.103 (filed Mar. 2, 2005) ("ACA 2005 Petition"). *See also* Public Notice, Report No. 2696, RM-11203 (Mar. 17, 2005). In the *NPRM*, the Commission incorporated by reference the ACA 2005 Petition and the comments filed in response thereto. *See NPRM*, 26 FCC Rcd at 2741, n. 130.

[202] Petition at 12-15.

[203] *NPRM*, 26 FCC Rcd at 2740-43, ¶¶ 42-45. Both sides set forth only general arguments concerning the need for these rules. Specifically, broadcasters uniformly oppose elimination of the exclusivity rules, arguing, among other things, that exclusive arrangements have pro-competitive benefits (LIN Reply at 18); that elimination would give MVPDs unfair leverage in retransmission consent negotiations (CBS Affiliates Comments at 6, 9; Joint Broadcasters Comments at 4, 13; NBC Affiliates Comments at 2, 5; Sinclair Comments at 23; SPT Comments at 11; WGAW Comments at 11; Joint Broadcasters Reply at 6), reduce broadcast stations' advertising revenues and have an negative effect on localism (CBS Comments at 16; CBS Affiliates Comments at 3-4, 8, 10; Joint Broadcasters

(continued….)

comments on this issue, the record in this proceeding to date does not provide a sufficient basis on which to make a determination whether the exclusivity rules are still needed in today's video marketplace and whether these rules should be eliminated. Accordingly, we are issuing this *FNPRM* to compile a more complete record on whether the exclusivity rules should be eliminated.

B. Discussion

55. We seek further comment on whether we should eliminate or modify the network non-duplication and syndicated exclusivity rules. Settled case law confirms that the Commission has jurisdiction under the Communications Act to impose the cable exclusivity rules.[204] We tentatively conclude that Congress has not withdrawn from the Commission the authority to amend or repeal the cable rules. In addition, we tentatively conclude that the Commission has the authority to eliminate the exclusivity rules for satellite carriers and open video systems. We request comment on whether the exclusivity rules are still needed to protect broadcasters' ability to compete in the video marketplace and to ensure that program suppliers have sufficient incentives to develop new and diverse programming. We seek comment on whether the Commission should eliminate these rules as an unnecessary regulatory intrusion in the marketplace if we determine that they are no longer needed to serve their intended purposes. In particular, we seek comment on the impact that elimination of the exclusivity rules would have on all interested parties, including broadcasters, MVPDs, program suppliers, and consumers.

1. Legal Authority

56. We tentatively conclude that the Commission has authority to eliminate the exclusivity rules for cable operators, satellite carriers, and open video systems. As discussed above, Congress did not explicitly mandate that the Commission adopt the network non-duplication and syndicated exclusivity rules for cable. Rather, the Commission adopted these rules to provide a mechanism for broadcasters to enforce their exclusive contractual rights in network and syndicated programming by preventing cable systems from importing distant network station programming.[205] Case law confirms that the Commission has the authority to impose exclusivity rules on cable operators under its broad grant of authority under

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Comments at 13; LIN Comments at 23; NAB Comments at iv-v, 58-59; NBC Affiliates Comments at 6-7; Sinclair Comments at 19-20, 23, Exhibit 1 at 35, 38; SPT Comments at 14-15, 17; WGAW Comments at 11; Joint Broadcasters Reply at 5; Journal Reply at 3; NAB Reply at 57; Tribune Reply at 4), and cause the migration of network and syndicated programming to non-broadcast networks (Belo Comments at 29; CBS Affiliates Comments at 4, 10; Gilmore *et al.* Comments at 17; Joint Broadcasters Comments at 14; NBC Affiliates Comments at 7; Tribune Reply at 5); and that judicial resolution of contractual exclusivity issues would be costly and ineffective (Belo Comments at 26, 28; CBS Affiliates Comments at 11; Disney Comments at 16-17; Gilmore *et al.* Comments at 16-17; LIN Comments at 23; Morgan Murphy Comments at 9; NBC Affiliates Comments at 10-11; Nexstar Comments at vi, 28; Sinclair Comments at 22-23; SPT Comments at 11-12; Journal Reply at 3; Tribune Reply at 4). MVPDs support elimination of the exclusivity rules, arguing, among other things, that the exclusivity rules are anti-competitive and give broadcasters an unfair advantage in retransmission consent negotiations (Starz Comments at 8-9; SureWest Comments at 15; TWC Comments at 22-23; US Telecom Comments at 23; TWC Reply at 16-17); that elimination of the exclusivity rules would minimize regulatory intrusion and better enable free market negotiations to set the terms for retransmission consent (Cablevision Comments at 24; Discovery Comments at 13; NTU Comments at 3; OPASTCO *et al.* Comments at 21, 23; APPA Group Reply at 12; AT&T Reply at 7; Knology Reply at 8); that increasing the difficulty and expense of enforcing contractual exclusivity would give stations a disincentive to use, or threaten to use, their exclusivity rights (SureWest Comments at 16; TWC Reply at 16); and that elimination of the exclusivity rules would not harm localism (APPA Group Comments at 19-20; Cablevision Comments at 24; Digital Liberty Comments at 3; Discovery Comments at 14; Mediacom *et al.* Comments at 17; SureWest Comments at 15-16; TWC Comments at 25-26; AT&T Reply at 9-10; Rate Counsel Reply at 8-9; TWC Reply at 17).

[204] *United Video,* 890 F.2d at 1182-1183.

[205] *See supra* ¶¶ 43, 48-50.

the Communications Act.[206] Section 653(b)(1)(D) of the Act, as codified by the 1996 Act, directed the Commission to extend to open video systems "the Commission's regulations concerning … network non-duplication (47 CFR 76.92 et seq.), and syndicated exclusivity (47 CFR 76.151 et seq.)."[207] Similarly, Section 339(b) of the Communications Act, as codified by SHVIA in 1999, directed the Commission to "apply network nonduplication protection (47 CFR 76.92) [and] syndicated exclusivity protection (47 CFR 76.151) … to the retransmission of the signals of nationally distributed superstations by satellite carriers."[208] Reflecting the language used in these statutory provisions, the legislative history of Section 339(b) states that Congress's intent was to place satellite carriers on an equal footing with cable operators with respect to the availability of television programming.[209]

57. Some broadcasters argue that eliminating the exclusivity rules for cable operators would be inconsistent with congressional intent and beyond the Commission's authority, given the longstanding Commission precedent involving the rules and a statement in the legislative history of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act") that the exclusivity rules were integral to achieving congressional objectives.[210] As the Commission has previously stated, however, "[i]f the [exclusivity] rules should ultimately prove unnecessary or need modification in light of the passage of time, congressional action or other factors, they can be modified or rescinded."[211] And we see no statutory provision that requires the Commission to keep the exclusivity rules on the books. Indeed, over the years, the Commission has made significant adjustments to the exclusivity regulatory scheme based on changed circumstances, for example, promulgating the syndicated exclusivity rules in 1972, repealing the syndicated exclusivity rules in 1980, and then reinstating the syndicated exclusivity rules in 1988. We tentatively conclude that, with full knowledge of these regulatory shifts, Congress nonetheless left intact the Commission's general rulemaking power with respect to the cable exclusivity rules, including the authority to revisit its rules and modify or repeal them should it conclude such action

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[206] *United Video, supra,* 890 F.2d at 1182-1183.

[207] *See* 47 U.S.C. § 573(b)(1)(D).

[208] *See id.* § 339(b).

[209] *See supra* n.156; *see also* H.R. Rep. No. 106-86(I), at 16 (1999) ("The Federal Communications Commission is directed to adopt network nonduplication [and] syndicated exclusivity … rules applicable to satellite retransmission of television signals. To the extent possible, the Commission should model its new regulations after those that currently apply to the cable industry").

[210] *See* S. Rep. No. 102-92, at 38 (1991) ("[T]he Committee has relied on the protections which are afforded local stations by the FCC's network non-duplication and syndicated exclusivity rules. Amendments or deletions of these rules in a manner which would allow distant stations to be submitted [sic] on cable systems for carriage or [sic] local stations carrying the same programming would, in the Committee's view, be inconsistent with the regulatory structure created in S. 12."). We note that this sentiment is not reflected in the actual text of the statute. *See also*Belo Comments at 27; CBS Comments at iii, 15-19; CBS Affiliates Comments at 7; Disney Comments at 18; Joint Broadcasters Comments at 3; NAB Comments at v, 58; NSBA Comments at 7-8, 11; Sinclair Comments at 21; SPT Comments at 7; CBS Reply at 7; NAB Reply at 57; *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 2965, 3006, ¶ 180 (1993) ("*Must Carry Order*") ("Congress intended that local stations electing retransmission consent should be able to invoke network non-duplication protection and syndicated exclusivity rights, whether or not these stations are actually carried by a cable system."). We also note that Congress seemed concerned with the importation of distant programming that would compete with local programming the cable system carries. That concern arguably does not extend to retransmission consent negotiating impasses, where a cable system deletes a local broadcast station's signal. In such a situation, Congress might favor the importation of a distant station so that consumers can access some programming, even if not the local programming.

[211] *1965 Network Exclusivity Order*, 3 FCC at 715, ¶ 82. *See also* TWC Reply at 15 (asserting that, although the Commission has declined to modify the exclusivity rules in the past, that does not preclude us from responding to changed circumstances in the video marketplace by modifying the rules today).

is appropriate.[212] We seek comment on this tentative conclusion. We also tentatively conclude that we have the authority to eliminate the exclusivity rules for DBS and OVS and seek comment on this tentative conclusion.[213] We note that, in enacting Sections 339(b) and 653(b)(1)(D) of the Act, Congress directed the Commission to apply to DBS and OVS the non-duplication and syndicated exclusivity protections that the Commission applied to cable, set forth in 47 C.F.R. §§ 76.92 and 76.151 of our rules, rather than simply enacting exclusivity protection for those services or even directing the Commission to adopt exclusivity rules for those services.[214] The statute does not withdraw the Commission's authority to modify its cable exclusivity rules at some point in the future, nor is there any indication in the legislative history that Congress intended to withdraw this authority. Given that the DBS and OVS provisions are expressly tied to the cable exclusivity rules, we tentatively conclude that this evinces an intent on the part of Congress that the Commission should accord the same regulatory treatment to DBS and OVS as cable, and seek comment on that tentative conclusion. Alternatively, are Congress's directives to the Commission regarding the application of network non-duplication and syndicated exclusivity protections to open video systems and to satellite carriers best interpreted to mean that the Commission does not have the authority to repeal the exclusivity rules for these types of entities, even if we decide to eliminate these rules for cable? Would elimination of the exclusivity rules for cable but not for DBS and/or OVS create undue regulatory disparities or disadvantages for these entities?

2. Assessing the Continued Need for Network Non-Duplication and Syndicated Exclusivity Rules

58. In this section, we seek comment on the extent to which the network non-duplication and syndicated exclusivity rules are still needed to serve their intended purposes in light of changes in the video marketplace and the legal landscape in the decades since their adoption. In the following section, we seek comment on how elimination of the exclusivity rules would impact affected parties. As discussed above, the network non-duplication and syndicated exclusivity rules were both intended in part to facilitate broadcasters' ability to compete in the video marketplace by protecting their exclusive contractual rights in network and syndicated programming from cable systems' importation of distant stations.[215] We seek comment on how changes in the video marketplace have impacted local broadcasters' ability to compete fairly with cable operators and other MVPDs. At the time the exclusivity rules were adopted, the Commission was concerned that cable systems' importation of distant stations carrying network or syndicated programming would adversely impact local broadcast stations by diverting the station's audience to the distant station, resulting in a reduction of the local station's advertising revenues, essentially the only source of revenue for the stations at the time.[216] To what extent would local broadcast stations' audiences likely be diverted to distant stations carried on cable systems if the exclusivity rules were eliminated? In this regard, we note that when the exclusivity rules were initially adopted, the Communications Act prohibited a broadcast station from rebroadcasting another

[212] *See* 47 U.S.C. §154(i) (authorizing the agency to "perform any and all acts, make such rules and regulations, and issue such orders not inconsistent with this Act, as may be necessary in the execution of its function"); 47 U.S.C. § 303(r) (providing that the Commission may "[m]ake such rules and regulations … not inconsistent with this law, as may be necessary to carry out the provisions of this Act….").

[213] We note that, in the recent *NPRM* proposing to eliminate the sports blackout rules, we tentatively concluded that we have the authority to eliminate the cable sports blackout rules and sought comment on whether we also have the authority to repeal the sports blackout rules for DBS and OVS. *See Sports Blackout Rules*, Notice of Proposed Rulemaking, FCC 13-162 (Dec. 17, 2013), at ¶ 15. We have received comments on the parallel statutory authority issues raised in that proceeding that have helped to inform our tentative conclusion in this proceeding that we have authority to eliminate the exclusivity rules for DBS and OVS, as well as cable.

[214] *See* 47 U.S.C. §§ 339(b), 573(b)(1)(d).

[215] *See supra* ¶¶ 43, 49.

[216] *See supra* ¶ 43 & n. 146, ¶ 49. Broadcast stations did not have the ability to collect retransmission consent fees until 1992.

station's signal without permission, but did not prohibit cable retransmission of broadcast stations without permission.[217] In the 1992 Cable Act, Congress extended this restriction on unauthorized retransmission of broadcast stations to cable operators.[218] The restriction on unauthorized retransmission of broadcast stations was later extended to all MVPDs.[219] Thus, in general, an MVPD may not carry a broadcast station's signal today without the consent of the broadcaster.[220] We seek comment on whether, given the extension of the prohibition on unauthorized retransmission of broadcast stations to MVPDs, the exclusivity regulations continue to be necessary or whether the retransmission consent requirement adequately addresses the Commission's regulatory goals and thus undercuts the basis for the exclusivity rules. Commenters argue that MVPDs are unlikely to seek to import a distant station's signal today unless they are faced with the blackout of a local station as a result of a retransmission dispute, and that any such importation would likely be limited in duration.[221] We seek comment on this view, and we request that commenters quantify or estimate any costs associated with importation of a distant station's signal and submit data supporting their positions. If MVPDs are unlikely to import distant stations except during an impasse in retransmission consent negotiations, does this support the view that the exclusivity rules are no longer needed?[222] We further note that, given the prohibition on unauthorized retransmission of broadcast stations, a distant station would have to agree to be imported in such circumstances and that contractual arrangements between networks and their affiliates may bar a broadcaster from agreeing to the importation of its distant signal. To what extent do existing network/affiliate agreements prohibit a local broadcaster from allowing its signal to be imported by a distant cable operator without reference to the existence of a Commission prohibition? Similarly, we seek comment on whether judicial enforcement of an exclusivity provision in a network affiliation or syndication agreement would be sufficient to protect the interests of local broadcasters and whether the public interest would be served by requiring such enforcement to proceed through normal contractual means, subject to the normal grounds on which the enforcement of exclusive contracts can be challenged. Additionally, broadcasters have increasingly sought and received monetary compensation in exchange for retransmission consent.[223] Would such

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[217] *See* 47 U.S.C. § 325(a) (1990) (amended 1992); *see also United Video*, 890 F.2d at 1176 ("The Communications Act forbids a broadcast station from rebroadcasting another broadcast station's signal without permission, 47 U.S.C. § 325(a), but does not forbid cable retransmission.... Accordingly, cable companies were free, as far as copyright law was concerned, to pick up signals aired by broadcasters and retransmit them throughout the country.").

[218] *See* 47 U.S.C. § 325(b)(1) (as added by Section 6 of the 1992 Act).

[219] *Id.* §§ 325(b)(1)(B) (as amended by Section 1008 of SHVIA); 573(c)(1)(B) (as enacted by Section 302 of the 1996 Act).

[220] *See id.;* 47 C.F.R. § 76.64. Section 325(b)(2) of the Act sets forth certain limited exceptions to the restriction on unauthorized retransmission of broadcast stations. *See* 47 U.S.C. § 325(b)(2); *see also* 47 C.F.R. § 76.64(b)..

[221] *See* Discovery Comments at 14 (asserting that "an MVPD would not seek to carry a distant station except in exigent circumstances, since its subscribers undoubtedly would prefer the local station and because of the higher license fees associated with carrying a distant station"); TWC Reply at 18-19 (asserting that, even in the absence of the exclusivity rules, cable operators likely would not choose to important distant signals unless doing so would benefit consumers as a result of a retransmission consent negotiating impasse); *id*. at 18 ("Moreover, there is no reason to expect that, in the absence of territorial exclusivity rules, there would be a spate of distant signal importations. MVPD subscribers generally prefer their local stations over non-local stations affiliated with the same network, and under the compulsory licensing regime, it is more expensive for an MVPD to carry a distant signal in place of a local signal, or to carry both at once. The carriage of multiple local and distant signals containing the same network programming also would consume additional bandwidth on capacity-constrained MVPD systems.").

[222] We seek comment below on broadcasters' argument that elimination of the exclusivity rules would skew retransmission consent negotiations unfairly in favor of MVPDs. *See infra* ¶ 65.

[223] *See 2013 Competition Report*, 28 FCC Rcd at 10599-60, ¶ 209 (noting that broadcast stations are demanding larger retransmission consent fees from MVPDs and that SNL Kagan data show that retransmission consent fees represented about 8.1 percent, or $1.76 billion in broadcast television station industry revenues in 2011, and about 9.4 percent, or $ 2.36 billion in 2012);

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demands for compensation or higher copyright license fees[224] associated with carrying distant stations discourage an MVPD from importing duplicative programming?[225] To the extent that an MVPD can import a distant station in an adjacent market for a lower retransmission consent fee, is the MVPD likely to carry that station instead of the local station? If an MVPD did choose to import duplicative programming, to what extent would such duplication likely result in diversion of the local station's audience?

59. We also seek comment on the likely impact that any diversion of a local station's audience to a distant station would have on the station's advertising revenues.[226] Would any such impact be different for a distant station in an adjacent market than for a distant station in a market that is very far away and with no connection to the local area? To the extent possible, we request that commenters quantify or estimate the likely effect of any such audience diversion on a station's advertising revenues and provide data supporting their positions. Moreover, we seek comment on the extent to which changes in the sources of local broadcast station revenues may impact the need for retaining the exclusivity rules. At the time the exclusivity rules were adopted, on-air advertising revenues were essentially the only source of revenue for broadcasters.[227] Today, on-air advertising revenues still constitute about 85 percent of broadcasters' revenues, but they are increasingly turning to additional revenue sources, including retransmission consent fees from MVPDs and advertising sold on their web sites.[228] Do the existence of those alternative revenue sources provide any new basis for either the abolition or retention of the exclusivity rules? That is, what effect, if any, do these changes in local broadcasters' sources of revenue have on the need for the exclusivity rules? What effect would repeal of the exclusivity rules have on the retransmission consent fees received by broadcasters and what are the public interests implications of any such effect?

60. As discussed above, the exclusivity rules were based in part on the Commission's concern that a cable system's duplication of local programming via the signals of distant stations was not a fair method of competition with broadcasters because broadcasters and cable systems were on an unequal footing with respect to the market for programming.[229] Is this reasoning still valid today, given that MVPDs now do compete with broadcasters for access to programming? Additionally, we invite comment on whether and how the growth in the number of video programming options available to

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http://www.snl.com/InteractiveX/articleabstract.aspx?ID=25877327&KPLT=2 (visited February 3, 2014) (projecting retransmission consent fees to reach $7.6 billion by 2019).

[224] The greater the number of distant signals a system carries, the greater the percentage the system must apply against its gross receipts and the greater the royalty it will pay under the cable compulsory license. *See* A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals, A Report of the Register of Copyrights, U.S. Copyright Office (August 1997), Executive Summary at iii, available at http://www.copyright.gov/reports/study.pdf.

[225] *See supra* n.221.

[226] *See* CBS Affiliates Comments at 3-4 (asserting that duplicative national programming in a market fractures the audience, thereby substantially reducing advertising revenues); Tribune Reply at 4 (stating that "lost audience revenues due to program duplication are truly lost — local advertisers in the distant signal's home market will not be willing to pay extra to reach distant viewers with whom they have little or no prospect of doing business").

[227] *See 1974 Network Exclusivity NOI/NPRM*, 46 FCC 2d at 1164, ¶ 3 ("The primary purpose of network program exclusivity has been to prevent the erosion or fractionalization of local television station audiences which could precipitate a substantial decrease in the advertising revenues of local stations and, thereby, threaten their continued economic viability.").

[228] *See 2013 Competition Report*, 28 FCC Rcd at 10571, 10595, ¶¶ 146, 203. On-air advertising represented about 86 percent of broadcast television station industry net revenues in 2011 and was expected to represent 85 percent of industry revenues in 2012. *See id.* at 10595, ¶ 203.

[229] *See supra* ¶ 43 & n.147.

consumers since the exclusivity rules were first adopted impacts the need for the exclusivity rules. Specifically, while a consumer seeking to purchase video programming service previously had one cable operator as the only video service option, today consumers may choose among several MVPDs and also may access video programming on the Internet.[230] Do broadcasters' demands for larger retransmission consent fees from the MVPDs in their market suggest a significant increase in their leverage in the marketplace?[231] Would such an increase in broadcasters' leverage and market power suggest that the exclusivity rules are no longer needed to protect broadcasters' ability to compete with MVPDs?[232] Why or why not? Would broadcasters' increase in leverage and market power be attributed to the exclusivity rights broadcasters have with respect to network and syndicated programming? Are there any other changes in the video marketplace that are relevant to whether the exclusivity rules are still needed to ensure fair and open competition between broadcasters and MVPDs?[233]

61. Further, we seek comment on the extent to which the exclusivity rules are still needed to provide incentives for program suppliers to produce syndicated and network programming and promote program diversity. In reinstating the syndicated exclusivity rules in 1988, the Commission concluded that financial incentives for program suppliers to develop new programming are greater with syndicated exclusivity rules than they are without them.[234] Specifically, the Commission found that duplication of syndicated programming diverts a substantial portion of the local broadcast audience to a distant station carried on a cable system, thereby lessening the value of syndicated programming to broadcast stations and lowering the price that syndicated program suppliers receive for their programming, which in turn reduces incentives for syndicated program suppliers to develop new programs.[235] Such reduced incentives, the Commission stated, translate into a reduction in the diversity of programming available to the public.[236] Are the Commission rules still necessary to the effectuation of that goal, or are alternative remedies available to private parties?

62. Commenters have argued that MVPDs would be unlikely to seek to import a distant station's signal unless they are faced with a blackout situation during an impasse in retransmission consent negotiations and that any such importation would probably be of limited duration.[237] If this argument is valid, we would not expect to see significant duplication of syndicated programming if we repeal our exclusivity rules. We seek comment on this view and the extent to which it should inform the Commission's decision. To the extent that duplication of syndicated and network programming is unlikely in today's competitive marketplace, are the exclusivity rules still needed to provide incentives for program suppliers to produce syndicated and network programming? In particular, we seek input from

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[230] *See id*. at 10499-50, ¶¶ 3-11.

[231] *See supra* n.223.

[232] *See supra* n.147 and accompanying text.

[233] *See id*.

[234] *See 1988 Program Exclusivity Order*, 3 FCC Rcd at 5309, ¶ 56.

[235] *See id.* at 5308-09, ¶¶ 50-59; *see also United Video*, 890 F.2d at 1178.

[236] *See 1988 Program Exclusivity Order*, 3 FCC Rcd at 5308, ¶ 50. We note that the Commission's orders addressing the network non-duplication rules (unlike the orders addressing the syndicated exclusivity rules) have not focused or relied on the need for these rules to provide incentives for program suppliers to develop network programming and promote diversity in network programming. Nevertheless, the Commission has stated that "many of the same policy concerns about ... enhancing diversity of programming ... raised with respect to syndicated programming apply here [to the network non-duplication rules] as well." *Id.* at 5318, ¶ 110. *See also Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Notice of Inquiry and Notice of Proposed Rulemaking, 2 FCC Rcd 2393, 2409, ¶ 48 (1987) (noting that the "same policy arguments about enhancing diversity of programming" would appear to apply to both the syndicated exclusivity and network non-duplication rules).

[237] *See supra* ¶ 58.

suppliers of syndicated programming on how elimination of our exclusivity rules would affect their incentives to develop new and diverse programming. One commenter notes that, unlike when the exclusivity rules were adopted, some program suppliers today "dilute" broadcasters' exclusive rights by selling DVDs or downloads of popular programs, by making programming available on mobile devices and online, in some cases at no charge to the audience but with associated advertising, and by licensing programs for distribution over cable networks at the same time they are distributed through broadcast stations.[238] We seek comment on the extent to which program suppliers currently dilute broadcasters' exclusive rights by making their programming available through multiple outlets. Does this existing duplication of programming undercut arguments that repeal of the exclusivity rules would adversely affect program suppliers' incentives to produce new and diverse programming? Are there other factors that we should consider in determining whether eliminating the exclusivity rules would adversely impact the diversity and supply of syndicated and network programming? Are there any factors or theories that would support retention of one set of exclusivity rules and not the other?

63. We note that the Commission previously relied in part on economic studies and other empirical data in considering the need for the syndicated exclusivity rules.[239] We seek evidence to assist in our determination as to whether the exclusivity rules are still needed today and to assess the potential impact of eliminating the exclusivity rules. To the extent commenters support repealing or maintaining the rules, we seek empirical data and other evidence to support elimination or retention of the exclusivity rules. To the extent that economic studies or other empirical data relevant to our inquiries in this proceeding are available, we urge commenters to submit such data.

3. Impact of Eliminating Network Non-Duplication and Syndicated Exclusivity Rules

64. If we determine that the network non-duplication and syndicated exclusivity rules are no longer needed to ensure fair competition between local broadcasters and MVPDs and to ensure the diversity and supply of syndicated programming, would there be any reason to retain these rules?[240] In particular, we seek comment on the costs and benefits of eliminating the exclusivity rules on all interested parties, including broadcasters, MVPDs, and program suppliers, and, of course, consumers. To the extent possible, commenters are requested to quantify any costs or benefits and submit supporting data. How should we weigh the costs and benefits of eliminating the exclusivity rules? Would any costs associated with eliminating the exclusivity rules outweigh the benefits of eliminating unnecessary or obsolete rules?

65. We seek comment on the impact of eliminating the exclusivity rules on retransmission consent negotiations. Would eliminating the rules merely eliminate a government-imposed barrier to free market negotiations?[241] We note, in this regard, that broadcasters assert that eliminating the exclusivity rules would give MVPDs unfair leverage in retransmission consent negotiations.[242] The Commission has previously found that "Congress intended that local stations electing retransmission consent should be able to invoke network nonduplication protection and syndicated exclusivity rights, whether or not these stations are actually carried by a cable system."[243] In support of this finding, the Commission cited the legislative history of the 1992 Act, which states that

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[238] *See* Tribune Reply at 5.

[239] *See 1979 Syndicated Exclusivity Report*, 71 FCC 2d at 951; *1979 Economic Inquiry*, 71 FCC 2d at 632.

[240] *See supra* n.147 and accompanying text.

[241] *See* Cablevision Comments at 24; Discovery Comments at 13; NTU Comments at 3; OPASTCO *et al.* Comments at 21; APPA Reply at 12; AT&T Reply at 7; Knology Reply at 8.

[242] *See* CBS Affiliates Comments at 6, 9; Joint Broadcasters Comments at 4, 13; NBC Affiliates Comments at 2, 5; Sinclair Comments at 23; SPT Comments at 11; WGAW Comments at 11; Joint Broadcasters Reply at 6.

[243] *See Must Carry Order*, 8 FCC Rcd at 3006, ¶ 180.

> the Committee has relied on the protections which are afforded local stations by the FCC's network non-duplication and syndicated exclusivity rules. Amendments or deletions of these rules in a manner which would allow distant stations to be submitted [sic] on cable systems for carriage or [sic] local stations carrying the same programming would, in the Committee's view, be inconsistent with the regulatory structure created in [the 1992 Act].[244]

We seek comment on the relationship between exclusivity protection and the retransmission consent regime and whether elimination of the exclusivity rules would be "inconsistent with the regulatory structure created in [the 1992 Act]." As discussed above, Congress appeared to be concerned with the importation of distant programming that would compete with local programming carried by the cable system.[245] Arguably, that concern does not extend to retransmission consent negotiation impasses, where the local broadcaster pulls its station from a cable system or other MVPD.[246] We seek comment on this proposition. What effect would the compulsory licenses have on broadcasters' ability to obtain through market-based negotiations the same exclusivity protection currently provided by our rules?[247] One commenter suggests that, because most broadcast network affiliation and syndicated exclusivity agreements grant exclusivity in the entire Designated Market Area, which is beyond the scope of exclusivity protected by the FCC rules, elimination of the exclusivity rules would likely result in a substantial expansion of exclusivity.[248] We seek comment on this view. If elimination of the exclusivity rules would likely result in expansion of exclusivity, does this argue in favor of or against elimination?

66. We seek comment on how elimination of the exclusivity rules would affect existing exclusivity contracts and broadcasters' ability to enforce those contracts. We note that upon elimination of our exclusivity rules, free market negotiations between broadcasters and networks or syndicated program suppliers would continue to determine the exclusivity terms of affiliation and syndicated programming agreements, and broadcasters and MVPDs would continue to conduct retransmission consent negotiations in light of these privately negotiated agreements, but without Commission intrusion in the form of a regulatory enforcement mechanism.[249] Thus, parties seeking to enforce contractual

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[244] *See id.* (citing S. Rep. No. 102-92, at 38).

[245] *See supra* n.210 and accompanying text. For example, a cable system may prefer to import the signal of a distant station in a larger metropolitan market rather than carry the signal of a local station in a smaller market. *See Cable Television Report and Order*, 36 FCC 2d at 179, ¶ 92 ("In establishing policy in this area we have had a number of conflicting considerations to reconcile. On the one hand, it is arguably desirable to allow cable systems the greatest possible choice, on the assumption that they will select those signals that will most appeal to their subscribers and are available at the least expense. But in that event there is a risk that most cable systems would select stations from either Los Angeles, Chicago, New York, or one of the other larger markets.").

[246] We note that at the time Congress made the statement referenced above, it would not have had experience with or reason to be concerned with retransmission consent impasses, which did not occur until several years later when broadcasters began demanding compensation in return for retransmission consent.

[247] *See supra* ¶ 58.

[248] *See* LIN Comments at 22; *see also* Nexstar Comments at 29-30 (asserting that the Commission's rules actually benefit MVPDs by limiting the geographic area in which a station can assert its territorial exclusivity, excluding small cable systems and DBS zip codes with few subscribers, exempting significantly viewed stations, and requiring that broadcasters follow certain requirements in order to exercise the rights).

[249] We note that there have been relatively few complaints filed with the Commission seeking enforcement of the exclusivity rules. *See, e.g., Northland Cable Television, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 7872, 7875-76, ¶¶ 9-11 (MB 2008) (declining to find a violation of the network non-duplication rules because the complainant failed to comply with the notice requirements for perfecting network non-duplication protection); *Northland Cable Television, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 7865, 7868, ¶ 9 (MB 2008) (declining to find a violation of the network non-duplication rules because the area for which protection was sought was outside the 35-mile zone of protection specified in the Commission's rules); *Nexstar Broadcasting, Inc. v. Cable One, Inc.*, Notice

(continued….)

network non-duplication and syndicated exclusivity provisions would need to seek recourse from the courts (or, if contracts permit, alternative dispute resolution mechanisms) rather than the Commission.[250] While some commenters assert that judicial enforcement of exclusive arrangements would be too difficult or costly,[251] they have not provided specific, detailed data in support of their assertions. To the extent that commenters assert that judicial enforcement of exclusivity agreements would be too difficult or costly, we request that they quantify or estimate any costs associated with judicial enforcement and submit data supporting their positions. We also specifically request comment on the impact that broadcasters' lack of direct privity of contract with MVPDs with respect to the exclusivity rights arising from network affiliation or syndication agreements would likely have on broadcasters' judicial recourse.[252] As a practical matter, in the absence of the exclusivity rules, how would a local station seeking to enforce an exclusivity agreement proceed against an MVPD that is importing the duplicative programming of a distant station, and how difficult and costly would that be? In this regard, one commenter suggests that a local station seeking to enforce an exclusivity agreement would have to proceed against the network or distant station (assuming that all network affiliates are made parties to all affiliation agreements with that network), which in turn would have to proceed against the MVPD.[253] Is this accurate? What costs would the local station incur? Could the local station instead, if made a party to other stations' affiliation agreements, bring a court action against the distant station that allowed its signal to be carried in the local station's market? If the record demonstrates that judicial enforcement of exclusivity agreements is too unwieldy and expensive, is there some other enforcement mechanism that could serve in the Commission's stead? Is there any legitimate reason that the Commission should provide a regulatory mechanism for enforcement of private exclusivity agreements?

67. TWC suggests that exclusivity agreements could be viewed as unreasonable restraints on trade under traditional antitrust principles if subjected to judicial scrutiny.[254] We seek comment on how

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of Apparent Liability for Forfeiture, 20 FCC Rcd. 18160, 18162-63, ¶ 8 (MB, 2005) (finding a cable operator apparently liable for a forfeiture for willful and repeated violations of the network non-duplication rules); *Storefront Television v. Last Mile Communications LLC, d/b/a Cable Choice and Liberty Cablevision of Puerto Rico, Ltd.*, Memorandum Opinion and Order, 21 FCC Rcd. 9929, 9930, ¶ 4 (MB, Policy Div. 2006) (denying two complaints seeking exclusivity protection because the complaining stations were low power television stations, which are not protected under the exclusivity rules).

[250] *See Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004, 2005 WL 2206070 (Sept. 5, 2005) ("SHVERA Section 208 Report to Congress")* at ¶ 49 ("Whether or not these rules remain in place, cable operators' ability to retransmit duplicative distant signals is governed in the first instance by the contract rights negotiated between broadcasters and their programming suppliers.").

[251] Commenters cite the following as examples of problems with the judicial resolution of contractual exclusivity: (i) an increase in the time, cost, and uncertainty of resolving these disputes; (ii) it would not be useful where the interference is caused by a non-party to the exclusivity agreement; (iii) less effective and less consistent resolution of contractual issues. *See* Belo Comments at 26, 28; CBS Affiliates Comments at 11; Disney Comments at 16-17; Gilmore *et al.* Comments at 16-17; LIN Comments at 23; Morgan Murphy Comments at 9; NBC Affiliates Comments at 11; Nexstar Comments at vi, 28; Sinclair Comments at 22-23; SPT Comments at 11-12; Journal Reply at 3; Tribune Reply at 4. *See also* Belo Comments at 13 (describing the exclusivity rules as "an essential method for enforcing privately negotiated rights").

[252] *See* Belo Comments at 28 (stating that "a judicial remedy might be inadequate in cases where the interference is by an actor that is not party to the exclusivity contract"); Sinclair Comments at 22 (asserting that contractual exclusivity alone may not provide adequate protection as displaced local stations would have "no direct privity with the offending MVPD").

[253] *See* Sinclair Comments at 22-23.

[254] *See* TWC Reply at 17 ("Even if the Commission declines to prohibit exclusivity agreements, forcing broadcasters to defend them in court would allow the application of traditional antitrust principles to expose these agreements for what they really are: unreasonable restraints on trade. There is no legitimate basis for the Commission to shield

(continued….)

application of antitrust principles might impact exclusivity agreements. Would the prospect of antitrust review of exclusivity agreements make broadcasters reluctant to seek recourse from the courts? And, if so, should this be a factor in our consideration of whether to retain these rules? Or should the possibility that exclusivity agreements could be anti-competitive in some circumstances militate against providing an enforcement mechanism that bypasses judicial review?

68. The NBC Affiliates assert that exclusivity rights are not free-standing rights that affiliates could enforce in the courts because network affiliation agreements grant exclusivity rights in terms of the Commission's rules.[255] Specifically, the NBC Affiliates state that its standard affiliation agreement provides that an affiliate is "entitled to invoke protection against the simultaneous duplication of NBC's network programming … to the maximum geographic extent from said community of license permitted under the present Sections 76.92 and 73.658(m) of the FCC's Rules and in accordance with the terms and conditions of said Rules."[256] The NBC Affiliates note, in this regard, that the Commission requires specific language referencing its rules in order for broadcasters to obtain network non-duplication and syndicated exclusivity rights with respect to DBS and to obtain syndicated exclusivity rights with respect to cable.[257] We seek comment on the impact of eliminating the exclusivity rules on such language in existing exclusivity agreements. To what extent do contracts for network and syndicated programming include such language? To what extent do such contracts include change of law provisions? If we eliminate the exclusivity rules, would it be necessary or appropriate to grandfather existing exclusivity contracts to ensure that such contracts are enforceable by the Commission for a period of time sufficient to allow existing contracts to be reformed, if the parties wish to retain the exclusivity provisions? If we grandfather existing exclusivity contracts, what would be a reasonable period of time to accord such contracts grandfathered status? Should we allow a period of time for renegotiation of contracts before the rule goes into effect? On the other hand, does the reference to Commission rules signal an intent by the contracting parties that exclusivity provisions should not exist if the Commission concludes that the exclusivity rules should not be maintained? Additionally, we seek comment on whether network affiliation agreements typically grant broadcasters exclusive distribution rights for any multicast streams of network programming that they air and how these multicast streams should figure in our analysis of whether to eliminate the exclusivity rules.[258]

69. We also seek comment on whether and how our analysis of the issues should differ for any subset of the affected parties, such as small market stations. Should the costs and benefits of eliminating the exclusivity rules be weighed differently for different sized broadcast stations? Two commenters assert that elimination of the exclusivity rules would be particularly harmful to small market stations, many of which operate in communities adjacent to larger markets with powerful stations.[259] We seek comment on the impact of elimination of the exclusivity rules on small market stations. We request that commenters quantify or estimate any costs of eliminating the exclusivity rules on small market

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territorial exclusivity from antitrust scrutiny, particularly in light of the market power possessed by the Big Four networks.").

[255] *See* NBC Affiliate Comments at 10; *see also* CBS Affiliate Comments at 10.

[256] NBC Affiliate Comments at 10; *see also* CBS Affiliate Comments at 11.

[257] *See* NBC Affiliate Comments at 10-11 (citing 47 C.F.R. §§ 76.109 and 76.124); *see also* CBS Affiliate Comments at 11 (same).

[258] Multicasting allows broadcast stations to offer digital streams or channels (*i.e.*, digital multicast signals) of programming simultaneously, using the same amount of spectrum previously required for one stream of analog programming. *See* FCC, DTV.gov: What is DTV?, http://www.dtv.gov/whatisdtv.html. Broadcasters may use multicast streams to carry network programming, such as one of the four major broadcast networks (*i.e.*, ABC, CBS, Fox, or NBC), other national broadcast networks (*e.g.*, The CW, Telemundo), or newer networks (*e.g.*, Bounce TV, Retro TV).

[259] *See* SPT Comments at 14-15, 17; Gilmore *et al.* Comments at 16.

stations and provide data supporting their submission. If we decide to eliminate the exclusivity rules, should the rules be retained, either permanently or for some period of time, for a class of smaller market stations? If so, how should we define that class and for what period of time should we retain the rules? Are there other classes of entities that warrant different treatment? We further note that the exclusivity rules currently exempt certain small MVPDs.[260] Should those exemptions be retained if we decide to retain the exclusivity rules? We also seek comment on how these exemptions have worked in practice. Do small systems often import distant broadcast stations? Does the experience of small systems shed any light on what is likely to happen if we eliminate our exclusivity rules? If so, does that experience suggest that the rules should be eliminated or retained?

70. In addition, we request comment on the impact of eliminating the exclusivity rules on localism.[261] A number of broadcasters have suggested that eliminating the exclusivity rules would have a negative impact on localism.[262] For example, the NBC Affiliates assert that "the loss of exclusivity would severely impair local broadcasters' ability to underwrite the costs associated with providing news and other locally responsive programming. This, in turn, would harm local businesses and local economies generally, given the importance of local broadcasting in connecting businesses with potential customers."[263] As discussed above, however, commenters claim MVPDs would be unlikely to seek to import a distant station's signal unless they are faced with a blackout situation in the context of a retransmission consent negotiation impasse.[264] If this is the case, is localism likely or unlikely to suffer if we eliminate the exclusivity rules? We invite comment on arguments in the record that elimination of the exclusivity rules is unlikely to harm localism.[265] We ask commenters to quantify as specifically as possible the economic impact, if any, of the elimination of the exclusivity rules on broadcasters' ability to provide news and other locally responsive programming. Moreover, we seek comment on whether elimination of the exclusivity rules would lead to migration of network and syndicated programming to

[260] As discussed above, the exclusivity rules for cable and OVS exempt systems serving fewer than 1,000 subscribers. *See* 47 C.F.R. §§ 76.95(a), 76.106(b), 76.1508(d), 76.1509. Similarly, the satellite exclusivity rules exempt areas in which the satellite carrier has fewer than 1,000 subscribers in a protected zone. *See id.* §§ 76.122(l), 76.123(m).

[261] The Commission has acknowledged the importance of the exclusivity rules in protecting localism in broadcasting. *See, e.g., SHVERA Section 208 Report to Congress* at ¶ 33 ("non-duplication and syndicated exclusivity protect localism by facilitating enforcement of contractual arrangements that limit importation of duplicative broadcast signals into local markets."); *1975 Network Exclusivity Order*, 52 FCC 2d at 520, ¶ 2 (mentioning an early concern about the potential adverse economic impact on local stations if cable systems were permitted to carry distant stations that duplicated a local station's programming).

[262] *See* NBC Affiliates Comments at 6-7; Belo Comments at 4-5, 28, 29-30; CBS Comments at 16; CBS Affiliates Comments at 3-4, 8, 10; Joint Broadcasters Comments at 13; LIN Comments at 23; NAB Comments at v, 58-59, Attachment D at 1; Sinclair Comments at 19-20, 23, Exhibit 1 at 35; SPT Comments at 14-15, 17; WGAW Comments at 11; Joint Broadcasters Reply at 5; Journal Reply at 3; NAB Reply at 57; Tribune Reply at 4.

[263] NBC Affiliates Comments at 6-7.

[264] *See supra* ¶ 58.

[265] Commenters also argue that elimination of the exclusivity rules is unlikely to harm localism because (i) network programming is largely identical across markets; (ii) consumers would pressure MVPDs to deliver stations with relevant local content; (iii) the exclusivity rules are often used to block importation of nearby stations that consumers would prefer; (iv) broadcasters would have the incentive to invest in more local programming to differentiate themselves from MVPDs; (v) MVPDs would pay a premium for local stations only to the extent that they provide local content; and (vi) many stations provide little local programming, which is available over-the-air anyway. *See* APPA Group Comments at 19-20; Cablevision Comments at 24; Digital Liberty Comments at 3; Discovery Comments at 14; Mediacom *et al.* Comments at 16-17; SureWest Comments at 15-16; TWC Comments at 25-26; AT&T Reply at 10; Rate Counsel Reply at 8-9; TWC Reply at 17.

non-broadcast networks and what that would mean in practical terms for local broadcasters, syndicators, networks, MVPDs, and consumers.[266]

71. We seek comment on whether there are any other entities that would be impacted by elimination of the exclusivity rules. If so, what are the benefits and costs of eliminating the rules for those entities? In particular, we seek comment on the potential impact on consumers of elimination of the exclusivity rules. We request that commenters quantify any benefits and costs to the extent possible and submit supporting data.

72. Under the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA"), Congress authorized satellite carriers to carry out-of-market significantly viewed stations[267] and applied the exclusivity rules insofar as local stations could challenge the significantly viewed status of the out-of-market station and thus prevent its carriage, just as in the cable context.[268] We seek comment on whether new rules would be needed to permit local stations to challenge the significantly viewed status of an out-of-market station if the exclusivity rules are eliminated or modified.[269] We also seek comment on whether we should make any modifications to the process for obtaining or challenging significantly viewed status if we retain the exclusivity rules.

73. Finally, we request comment on whether, as an alternative to elimination of the exclusivity rules, we should make modifications to these rules. ACA and BCI suggest that if we do not eliminate the exclusivity rules, we should harmonize these rules by applying the Grade B or noise limited service contour exception for syndicated exclusivity to the network non-duplication rules.[270] Under the Grade B service contour exception, a station may not obtain syndicated exclusivity protection against another station if such station places a Grade B signal over the cable community.[271] According to ACA, "[b]roadcast stations should have no reasonable expectation of exclusivity against adjacent-market stations receivable in the community over-the-air, as the Commission intended the exclusivity rules to

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[266] *See* Belo Comments at 29; CBS Affiliates Comments at 4, 10; Gilmore *et al.* Comments at 17; Joint Broadcasters Comments at 14; NBC Affiliates Comments at 7; Tribune Reply at 5.

[267] Currently, 17 U.S.C. § 122(a)(2) and 47 U.S.C. § 340.

[268] *See Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Implementation of Section 340 of the Communications Act*, Report and Order, 20 FCC Rcd 17278, 17295-96, ¶ 39 (2005) ("*SHVERA Significantly Viewed Report and Order*"). As discussed above, significantly viewed status is an exception to the network non-duplication rules. 47 C.F.R. § 76.92(f). SHVERA provided that if a station was to be carried out-of-market as a significantly viewed station, it would be subject to the rules allowing an in-market station to assert network non-duplication to prevent carriage of the significantly viewed station if it demonstrated that the significantly viewed status was no longer valid. *See SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17296, ¶ 41. Thus, for satellite carriers, if a station is demonstrated to no longer be significantly viewed, it is not eligible for carriage as an out-of-market significantly viewed station.

[269] *See supra* n.151.

[270] *See* ACA Comments at 67; BCI Comments at 11-12.

[271] *See 1988 Program Exclusivity Order*, 3 FCC Rcd at 5315, ¶ 96; *see also* 47 C.F.R. § 76.106(a) ("a broadcast signal is not required to be deleted from a cable community unit when that cable community unit falls, in whole or in part, within that signal's grade B contour"). While the Grade B contour defined an analog television station's service area, *see* 47 C.F.R. § 73.683(a), with the completion of the full power digital television transition on June 12, 2009, there are no longer any full power analog stations. Instead, as set forth in Section 73.622(e), a station's DTV service area is defined as the area within its noise-limited contour where its signal strength is predicted to exceed the noise-limited service level. *See id.* § 73.622(e). Accordingly, the Commission has treated a digital station's noise limited service contour as the functional equivalent of an analog station's Grade B contour. *See Report To Congress: The Satellite Home Viewer Extension and Reauthorization Act of 2004; Study of Digital Television Field Strength Standards and Testing Procedures*, 20 FCC Rcd 19504, 19507, ¶ 3, 19554, ¶ 111 (2005); *SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17292, ¶ 31.

prevent importing duplicative distant signals that are not available over-the-air in the community."[272] We seek comment on this proposal.[273] We also seek comment on whether we should modify the network non-duplication and syndicated exclusivity rules to apply only where the local station has granted retransmission consent to, and is carried by, the MVPD.[274] Under this approach, a television station would only be permitted to assert network non-duplication or syndicated exclusivity protection if it is actually carried on the cable system. What effect would this approach have in situations where a cable system and broadcast station reach an impasse in retransmission consent negotiations? We observe that retransmission by an MVPD of the signal of certain superstations is not subject to retransmission consent requirements.[275] Does the fact that the statute exempts this class of stations from retransmission consent requirements militate in favor of or against eliminating the network non-duplication and syndicated exclusivity rules? Should the Commission modify its exclusivity rules in light of the Middle Class Tax Relief and Job Creation Act of 2012 (the "Spectrum Act"), which provides full power and Class A television stations an opportunity to relinquish their existing channels by auction in order to channel share with another television licensee?[276] Commenters that support these or any other such modifications should quantify the benefits and costs of the proposed modifications and provide supporting data. Are there any other modifications that we should consider if we decide to retain the exclusivity rules?

V. PROCEDURAL MATTERS

A. Regulatory Flexibility Act

74. *Final Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act of 1980, as amended ("RFA"),[277] the Commission has prepared a Final Regulatory Flexibility Analysis ("FRFA") relating to this *Order* in MB Docket No. 10-71. The FRFA is set forth in Appendix B.

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[272] ACA Comments at 67-68.

[273] ACA states that the Commission previously proposed to extend the Grade B service contour exception to the network non-duplication rules but never acted on this proposal. *See id.* at 69; *see also Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Further Notice of Proposed Rulemaking, 3 FCC Rcd 6171, 6177, ¶¶ 41-42 (1988) (seeking comment on whether to extend the Grade B signal contour exception to the network non-duplication rules).

[274] *See* Cablevision Comments at 26; SureWest Comments at 14; TWC Comments at 26; TWC Reply Comments at 17; *see also NPRM*, 26 FCC Rcd at 2742, ¶ 44.

[275] *See* 47 U.S.C. § 325(b)(2)(D) (the provisions of Section 325 "shall not apply to … retransmission by a cable operator or other multichannel video programming distributor of the signal of a superstation").

[276] *See* Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. 112-96, §§ 6402, 47 U.S.C. § 309(j)(8)(G), 6403, 47 C.F.R. § 1452, 126 Stat. 156 (2012) ("Spectrum Act"). The Spectrum Act provides that certain broadcasters have the opportunity to submit a bid in a reverse auction, to be conducted by the Commission, in which they agree to relinquish the spectrum usage rights on their existing channel in exchange for the right to channel share with another broadcaster. *See id.* § 6403(a)(2)(C), 47 U.S.C. § 1452(a)(2)(C). When this happens, a cable operator could be carrying both an existing local station - the sharer - as well as a new station - the sharee. If a local full power sharer station has network nonduplication or syndicated exclusivity rights to particular programming, but the new sharee station also had exclusive rights to this same programming at its old location, then the cable operator may be presented with a question as to which station's programming it would be required to drop to resolve these conflicting exclusivity rights. Alternatively, if only the sharee station had exclusive rights, would the cable operator be required to honor those rights at the station's new location? These situations (and there may be others) are not covered by our current rules.

[277] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 ("CWAAA").

75. *Initial Regulatory Flexibility Analysis*. As required by the RFA, the Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA") relating to the *FNPRM*. The IRFA is set forth in Appendix C.

B. Paperwork Reduction Act

76. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

C. Congressional Review Act

77. The Commission will send a copy of the *Order* in MB Docket No. 10-71 in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

D. Ex Parte Rules

78. Permit-But-Disclose. This proceeding shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[278] Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

E. Filing Requirements

79. Comments and Replies. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://fjallfoss.fcc.gov/ecfs2/.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this

[278] 47 C.F.R. §§ 1.1200 *et seq.*

proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington, DC 20554.

80. Availability of Documents. Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, S.W., CY-A257, Washington, D.C., 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

81. People with Disabilities. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

F. Additional Information

82. For additional information on this proceeding, contact Raelynn Remy, Raelynn.Remy@fcc.gov, Diana Sokolow, Diana.Sokolow@fcc.gov, or Kathy Berthot, Kathy.Berthot@fcc.gov, of the Policy Division, Media Bureau, (202) 418-2120.

VI. ORDERING CLAUSES

83. Accordingly, **IT IS ORDERED** that, pursuant to the authority found in Sections 4(i), 4(j), 301, 303(r), 303(v), 307, 309, 325, 339(b), 340, 614, and 653(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 301, 303(r), 303(v), 307, 309, 325, 339(b), 340, 534, and 573(b), this *Report and Order and Further Notice of Proposed Rulemaking* **IS ADOPTED**, effective thirty (30) days after the date of publication in the *Federal Register*.

84. **IT IS ORDERED** that, pursuant to the authority found in Sections 4(i), 4(j), 301, 303(r), 303(v), 307, 309, 325, and 614 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 301, 303(r), 303(v), 307, 309, 325, and 534, the Commission's rules **ARE HEREBY AMENDED** as set forth in Appendix A.

85. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this *Report and Order and Further Notice of Proposed Rulemaking* in MB Docket No. 10-71, including the Final Regulatory Flexibility Analysis and the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

86. **IT IS FURTHER ORDERED** that the Commission **SHALL SEND** a copy of this *Report and Order* in MB Docket No. 10-71 in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Final Rules

The Federal Communications Commission amends 47 CFR part 76 as follows:

PART 76 – Multichannel Video and Cable Television Service

1. The authority citation for part 76 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Amend § 76.65 by removing "and" from paragraph (b)(1)(vi) to read as follows:

§ 76.65 Good faith and exclusive retransmission consent complaints.

* * * * *

(b) *Good faith negotiation – (1) Standards.* * * *

* * * * *

(vi) Execution by a Negotiating Entity of an agreement with any party, a term or condition of which, requires that such Negotiating Entity not enter into a retransmission consent agreement with any other television broadcast station or multichannel video programming distributor;~~ and~~

3. Amend § 76.65 by removing "." from paragraph (b)(1)(vii) and adding "; and" to read as follows:

(vii) Refusal by a Negotiating Entity to execute a written retransmission consent agreement that sets forth the full understanding of the television broadcast station and the multichannel video programming distributor~~.~~; and

4. Amend § 76.65 by adding paragraph (b)(1)(viii) to read as follows:

(viii) Joint negotiation.

(A) Joint negotiation includes the following activities:

(*1*) Delegation of authority to negotiate or approve a retransmission consent agreement by one Top Four broadcast television station (or its representative) to another such station (or its representative) that is not commonly owned, operated, or controlled, and that serves the same designated market area ("DMA");

(*2*) Delegation of authority to negotiate or approve a retransmission consent agreement by two or more Top Four broadcast television stations that are not commonly owned, operated, or controlled, and that serve the same DMA (or their representatives), to a common third party;

(*3*) Any informal, formal, tacit or other agreement and/or conduct that signals or is designed to facilitate collusion regarding retransmission terms or agreements between or among Top Four broadcast television stations that are not commonly owned, operated, or controlled, and that serve the same DMA. This provision shall not be interpreted to apply to disclosures otherwise required by law or authorized under a Commission or judicial protective order.

(B) For the purpose of applying this rule:

(*1*) Whether a station is not commonly owned, operated, or controlled is determined based on the Commission's broadcast attribution rules. *See* 47 CFR § 73.3555 Notes.

(*2*) A station is deemed to be a Top Four station if it is ranked among the top four stations in a DMA, based on the most recent all-day (9 a.m.-midnight) audience share, as measured by Nielsen Media Research or by any comparable professional, accepted audience ratings service; and

(*3*) DMA is determined by Nielsen Media Research or any successor entity.

APPENDIX B

Final Regulatory Flexibility Analysis for the Report and Order

1. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA"),[1] the Initial Regulatory Flexibility Analysis ("IRFA") was incorporated into the Notice of Proposed Rulemaking ("NPRM*"*) in this proceeding.[2] The Federal Communications Commission ("Commission") sought written public comment on the proposals in the *NPRM*, including comment on the IRFA. This Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA.[3]

A. Need for, and Objectives of, the Report and Order

2. In the Report and Order ("*Order*"), we revise our "retransmission consent" rules, which govern carriage negotiations between broadcast television stations and multichannel video programming distributors ("MVPDs").[4] In March 2010, 14 MVPDs and public interest groups filed a rulemaking petition arguing that changes in the marketplace, and the increasingly contentious nature of retransmission consent negotiations, justify revisions to the Commission's rules governing retransmission consent.[5] The Commission initiated this proceeding[6] and a robust record developed. The action we take in this *Order* will help to ensure the successful completion of negotiations between broadcast stations and MVPDs. Specifically, we address MVPDs' argument that competing broadcast television stations ("broadcast stations" or "stations") obtain undue bargaining leverage by negotiating together when they are not commonly owned. In the *Order*, we conclude that such joint negotiation by stations that are ranked among the top four stations in a market as measured by audience share ("Top Four" stations) and are not commonly owned constitutes a violation of the statutory duty to negotiate retransmission consent in good faith.[7] It is our intention that this action will facilitate the fair and effective completion of retransmission consent negotiations.[8]

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[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 ("CWAAA").

[2] *See Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718, app. C (2011) ("*IRFA*").

[3] *See* 5 U.S.C. § 604.

[4] The Communications Act of 1934, as amended (the "Act"), prohibits MVPDs from retransmitting a broadcast television station's signal without the station's consent. 47 U.S.C. § 325(b)(1)(A).

[5] Time Warner Cable Inc. *et al.* Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent, MB Docket No. 10-71 (filed Mar. 9, 2010) (the "Petition"). Petitioners include: American Cable Association; Bright House Networks, LLC; Cablevision Systems Corp.; Charter Communications, Inc.; DIRECTV, Inc.; DISH Network LLC; Insight Communications Company, Inc.; Mediacom Communications Corp.; New America Foundation; OPASTCO; Public Knowledge; Suddenlink Communications; Time Warner Cable Inc.; and Verizon. The Media Bureau sought comment on the Petition. *See Media Bureau Seeks Comment on a Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent,* Public Notice, 25 FCC Rcd 2718 (MB 2010).

[6] *Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718 (2011) ("*NPRM*").

[7] *See supra Order* Section III. The statutory duty to negotiate retransmission consent in good faith applies to both broadcasters and MVPDs. *See* 47 U.S.C. § 325(b)(3)(C).

[8] The *NPRM* sought comment on additional issues related to retransmission consent, including strengthening the *per se* good faith negotiation standards in other specific ways, clarifying the totality of the circumstances good faith negotiation standard, revising the notice requirements related to dropping carriage of a television station, and application of the sweeps prohibition to retransmission consent disputes. *See NPRM*, 26 FCC Rcd at 2727-40, ¶¶

(continued….)

B. Legal Basis

3. The action in this *Order* is authorized pursuant to Sections 4(i), 4(j), 301, 303(r), 303(v), 307, 309, 325, and 614 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 301, 303(r), 303(v), 307, 309, 325, and 534.

C. Summary of Significant Issues Raised in Response to the IRFA

4. While several parties filed comments describing the impact of the current retransmission consent rules on small businesses, and the potential impact of several proposed rules on small businesses, only the U.S. Small Business Administration Office of Advocacy ("SBA") commented specifically with the RFA process in mind. Noting that part of its role is "to monitor agency compliance with the RFA," the SBA filed comments describing the impact of the current rules on small MVPDs.[9] On balance, we believe that the rules adopted in this *Order* will encourage parties to reach agreements, thus benefiting small businesses including the small MVPDs on whose behalf SBA commented. SBA specifically urged the Commission to adopt proposals that the Commission concluded in the *NPRM* were beyond its authority to adopt, including interim carriage in the event of a retransmission consent impasse as well as a dispute resolution process.[10] The *NPRM* sought comment on that conclusion but we note here that such proposals are beyond the scope of this *Order*.[11] To the extent the Commission addresses these issues in the future, SBA's comments will be fully considered.[12]

5. Without mentioning the IRFA, a couple of parties commented on the impact of the specific rules adopted in this *Order* on small entities. For example, parties representing small MVPDs were generally in favor of a joint negotiation ban, arguing that joint negotiation enables broadcast stations to charge supra-competitive retransmission consent fees to MVPDs which, in turn, are passed along to consumers in the form of higher rates for MVPD services,[13] and that joint negotiation heightens the disruption caused by negotiating breakdowns and depletes capital that MVPDs otherwise could use to deploy broadband and other advanced services.[14] Parties representing broadcasters generally argued that the joint negotiation enhances efficiency and reduces transaction costs, thereby facilitating agreements

(Continued from previous page)
17-41. This *Order* addresses only joint negotiation, and the *FNPRM* addresses the exclusivity rules, and the record remains open on the other issues discussed in the *NPRM*.

[9] Comments of Office of Advocacy, U.S. Small Business Administration Comments at 2, 3-4 ("SBA Comments").

[10] *NPRM*, 26 FCC Rcd at 2727-28, ¶¶ 18-19; SBA Comments at 2, 3-4.

[11] *NPRM*, 26 FCC Rcd at 2727-28, ¶¶ 18-19. As noted above, the record remains open on the other issues discussed in the *NPRM* that are not addressed in this *Order*. *See supra Order*, n.8.

[12] The final regulatory flexibility analysis must contain "the response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration, and a detailed statement if the SBA comment causes a change from the proposed rule to the final rule." 5 U.S.C. § 604(a)(3). We emphasize that the SBA comments in this proceeding were silent on the proposals actually adopted. Should the Commission in the future address the issues on which SBA commented, it will fully consider SBA's position.

[13] *See* Comments of the American Cable Association at 5-8 ("ACA Comments"); Comments of the American Public Power Association at 11, 22 ("APPA Group Comments"); Comments of Mediacom Communications Corp. *et al.* at 19-22 ("Mediacom *et al.* Comments"); Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies *et al.* at 11-12 ("OPASTCO *et al.* Comments"); Comments of the United States Telecom Association at 27-28 ("US Telecom Comments"); Reply Comments of the American Cable Association at 2-42 ("ACA Reply"); Reply Comments of the American Public Power Association at 19-20 ("APPA Group Reply"); Reply Comments of Mediacom Communications Corp. *et al.* at 6-7 ("Mediacom *et al.* Comments").

[14] *See* ACA Comments at 14-17. Although ACA supports a prohibition on joint negotiation in general, its advocacy in this proceeding is principally focused on joint negotiation by separately owned top four stations that serve the same market.

and resulting in lower retransmission consent rates.[15] These parties also contend that joint negotiation helps small broadcasters to reduce their operating costs and devote more resources to local programming;[16] and that a prohibition on joint negotiation would arbitrarily inflict greater harm on some broadcasters based on spectrum allocation and market size.[17]

D. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

6. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted in the *Order*.[18] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[19] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[20] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[21] Below are descriptions of the small entities that are directly affected by the rules adopted in the *Order*, including, where feasible, an estimate of the number of such small entities.

7. *Wired Telecommunications Carriers*. The 2007 North American Industry Classification System ("NAICS") defines "Wired Telecommunications Carriers" as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry."[22] The SBA has developed a small business size standard for wireline firms within the broad economic census category, "Wired

[15] *See, e.g.,* Comments of Belo Corporation at 23 ("Belo Comments"); Comments of the CBS Television Network Affiliates Association at 19 ("CBS Affiliates Comments"); Comments of the National Association of Broadcasters at 27 ("NAB Comments"); Comments of the NBC Television Affiliates at 18 ("NBC Affiliates Comments"); Comments of Nexstar Broadcasting, Inc. at 20-22 ("Nexstar Comments"); Comments of Sinclair Broadcast Group at 23 ("Sinclair Comments"); Reply Comments of Journal Broadcast Corporation at 4 ("Journal Reply"); Reply Comments of the National Association of Broadcasters at 47, 50-51 ("NAB Reply").

[16] *See, e.g.,* CBS Affiliates Comments at 20; Comments of Barrington Broadcast Group, LLC *et al.* at 21 ("Joint Broadcasters Comments"); NAB Comments at 26; Comments of the Writers Guild of America, West Inc. at 10 ("WGAW Comments"); NAB Reply at 48, 51.

[17] *See* Sinclair Comments at 23, 25.

[18] 5 U.S.C. § 603(b)(3).

[19] *Id*. § 601(6).

[20] *Id*. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[21] 15 U.S.C. § 632.

[22] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers"; http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

Telecommunications Carriers."[23] Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees. Census data for 2007 shows that there were 31,996 establishments that operated that year.[24] Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.[25] Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities.

8. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined above. The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. Census data for 2007 shows that there were 31,996 establishments that operated that year.[26] Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.[27] Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities.

9. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers, nationwide.[28] Industry data shows that there were 1,141 cable companies at the end of June 2012.[29] Of this total, all but 10 incumbent cable companies are small under this size standard.[30] In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.[31] Industry data indicate that, of 7,208

[23] 13 C.F.R. § 121.201 (NAICS code 517110).

[24] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.

[25] *Id*.

[26] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.

[27] *Id*.

[28] 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of $100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation,* Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

[29] NCTA, Industry Data, Number of Cable Operating Companies (June 2012), http://www.ncta.com/Statistics.aspx (visited Sept. 28, 2012). Depending upon the number of homes and the size of the geographic area served, cable operators use one or more cable systems to provide video service. *See Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, MB Docket No. 12-203, Fifteenth Report, FCC 13-99 at ¶ 24 (rel. July 22, 2013) ("*15th Annual Competition Report*").

[30] *See* SNL Kagan, "Top Cable MSOs – 12/12 Q"; available at http://www.snl.com/InteractiveX/TopCableMSOs.aspx?period=2012Q4&sortcol=subscribersbasic&sortorder=desc. We note that, when applied to an MVPD operator, under this size standard (*i.e.*, 400,000 or fewer subscribers) all but 14 MVPD operators would be considered small. *See* NCTA, Industry Data, Top 25 Multichannel Video Service Customers (2012), http://www.ncta.com/industry-data (visited Aug. 30, 2013). The Commission applied this size standard to MVPD operators in its implementation of the CALM Act. *See Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, MB Docket No. 11-93, Report and Order, 26 FCC Rcd 17222, 17245-46, ¶ 37 (2011) ("*CALM Act Report and Order*") (defining a smaller MVPD operator as one serving 400,000 or fewer subscribers nationwide, as of December 31, 2011).

[31] 47 C.F.R. § 76.901(c).

systems nationwide, 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000-19,999 subscribers.[32] Thus, under this standard, most cable systems are small.

10. *Cable System Operators* (Telecom Act Standard). The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[33] There are approximately 56.4 million incumbent cable video subscribers in the United States today.[34] Accordingly, an operator serving fewer than 564,000 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[35] Based on available data, we find that all but 10 incumbent cable operators are small under this size standard.[36] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million.[37] Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

11. *Direct Broadcast Satellite ("DBS") Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic "dish" antenna at the subscriber's location. DBS, by exception, is now included in the SBA's broad economic census category, "Wired Telecommunications Carriers,"[38] which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.[39] Census data for 2007 shows that there were 31,996 establishments that operated that year.[40] Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.[41] Therefore, under this size standard, the majority of such businesses can be considered small. However, the data we have available as a basis for estimating the number of such small entities were gathered under a superseded SBA small business size standard formerly titled "Cable and Other Program Distribution." The definition of Cable and Other Program Distribution provided that a small

[32] TELEVISION AND CABLE FACTBOOK 2006, at F-2 (Albert Warren ed., 2005) (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

[33] 47 U.S.C. § 543(m)(2); *see* 47 C.F.R. § 76.901(f) & nn. 1-3.

[34] *See* NCTA, Industry Data, Cable Video Customers (2012), http://www.ncta.com/industry-data (visited Aug. 30, 2013).

[35] 47 C.F.R. § 76.901(f); *see* Public Notice, FCC Announces New Subscriber Count for the Definition of Small Cable Operator, DA 01-158 (Cable Services Bureau, Jan. 24, 2001).

[36] *See* NCTA, Industry Data, Top 25 Multichannel Video Service Customers (2012), http://www.ncta.com/industry-data (visited Aug. 30, 2013).

[37] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. *See* 47 C.F.R. § 76.901(f).

[38] *See* 13 C.F.R. § 121.201, NAICS code 517110 (2007). The 2007 NAICS definition of the category of "Wired Telecommunications Carriers" is in paragraph 7, above.

[39] 13 C.F.R. § 121.201, NAICS code 517110 (2007).

[40] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.

[41] *Id*.

entity is one with $12.5 million or less in annual receipts.[42] Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and DISH Network.[43] Each currently offer subscription services. DIRECTV and DISH Network each report annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS service provider.

12. *Satellite Master Antenna Television (SMATV) Systems, also known as Private Cable Operators (PCOs)*. SMATV systems or PCOs are video distribution facilities that use closed transmission paths without using any public right-of-way. They acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. SMATV systems or PCOs are now included in the SBA's broad economic census category, "Wired Telecommunications Carriers,"[44] which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.[45] Census data for 2007 shows that there were 31,996 establishments that operated that year.[46] Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.[47] Therefore, under this size standard, the majority of such businesses can be considered small.

13. *Home Satellite Dish ("HSD") Service.* HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Wired Telecommunications Carriers.[48] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. Census data for 2007 shows that there were 31,996 establishments that operated that year.[49] Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had

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[42] 13 C.F.R. § 121.201; NAICS code 517510 (2002).

[43] See *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, 28 FCC Rcd 10496, Fifteenth Report, at 10507, ¶ 27 (rel. July 22, 2013) (*"15th Annual Competition Report"*). As of June 2012, DIRECTV is the largest DBS operator and the second largest MVPD in the United States, serving approximately 19.9 million subscribers. DISH Network is the second largest DBS operator and the third largest MVPD, serving approximately 14.1 million subscribers. *Id*. at 10507, 10546, ¶¶ 27, 110-11.

[44] *See* 13 C.F.R. § 121.201, NAICS code 517110 (2007).

[45] 13 C.F.R. § 121.201, NAICS code 517110 (2007).

[46] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.

[47] *Id*.

[48] 13 C.F.R. § 121.201, NAICS code 517110 (2007).

[49] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.

100 or more employees.[50] Therefore, under this size standard, the majority of such businesses can be considered small.

14. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and "wireless cable," transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)).[51] In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than $40 million in the previous three calendar years.[52] The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.[53] After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas.[54] The Commission offered three levels of bidding credits: (i) a bidder with attributed average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years (small business) will receive a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed $3 million and do not exceed $15 million for the preceding three years (very small business) will receive a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed $3 million for the preceding three years (entrepreneur) will receive a 35 percent discount on its winning bid.[55] Auction 86 concluded in 2009 with the sale of 61 licenses.[56] Of the 10 winning bidders, two bidders that claimed small business status won four licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

15. In addition, the SBA's placement of Cable Television Distribution Services in the category of Wired Telecommunications Carriers is applicable to cable-based EBS. Since 2007, Cable Television Distribution Services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises

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[50] *Id.*

[51] *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, MM Docket No. 94-131, PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589, 9593, ¶ 7 (1995).

[52] 47 C.F.R. § 21.961(b)(1).

[53] 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard of 1500 or fewer employees.

[54] *Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86*, Public Notice, 24 FCC Rcd 8277 (2009).

[55] *Id.* at 8296.

[56] *Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period*, Public Notice, 24 FCC Rcd 13572 (2009).

establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services."[57] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. Census data for 2007 shows that there were 31,996 establishments that operated that year.[58] Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.[59] Therefore, under this size standard, the majority of such businesses can be considered small entities. In addition to Census data, the Commission's internal records indicate that, as of September 2012, there are 2,241 active EBS licenses.[60] The Commission estimates that of these 2,241 licenses, the majority are held by non-profit educational institutions and school districts, which are by statute defined as small businesses.[61]

16. *Fixed Microwave Services.* Microwave services include common carrier,[62] private-operational fixed,[63] and broadcast auxiliary radio services.[64] They also include the Local Multipoint Distribution Service (LMDS),[65] the Digital Electronic Message Service (DEMS),[66] and the 24 GHz Service,[67] where licensees can choose between common carrier and non-common carrier status.[68] At present, there are approximately 31,428 common carrier fixed licensees and 79,732 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. There are

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[57] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers," (partial definition), www.census.gov/naics/2007/def/ND517110.HTM#N517110. Examples of this category are: broadband Internet service providers (*e.g.*, cable, DSL); local telephone carriers (wired); cable television distribution services; long-distance telephone carriers (wired); closed circuit television ("CCTV") services; VoIP providers, using own operated wired telecommunications infrastructure; direct-to-home satellite system ("DTH") services; telecommunications carriers (wired); satellite television distribution systems; and multichannel multipoint distribution services ("MMDS").

[58] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.

[59] *Id*.

[60] http://wireless2.fcc.gov/UlsApp/UlsSearch/results.jsp.

[61] The term "small entity" within SBREFA applies to small organizations (non-profits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6).

[62] *See* 47 C.F.R. Part 101, Subparts C and I.

[63] *See* 47 C.F.R. Part 101, Subparts C and H.

[64] Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. *See* 47 C.F.R. Part 74. Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

[65] *See* 47 C.F.R. Part 101, Subpart L.

[66] *See* 47 C.F.R. Part 101, Subpart G.

[67] *See id.*

[68] *See* 47 C.F.R. §§ 101.533, 101.1017.

approximately 120 LMDS licensees, three DEMS licensees, and three 24 GHz licensees. The Commission has not yet defined a small business with respect to microwave services. For purposes of the IRFA, we will use the SBA's definition applicable to Wireless Telecommunications Carriers (except satellite)—*i.e.*, an entity with no more than 1,500 persons.[69] Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.[70] For the category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007 show that there were 11,163 firms that operated that year.[71] Of those, 10,791 had fewer than 1000 employees, and 372 firms had 1000 employees or more. Thus under this category and the associated small business size standard, the majority of firms can be considered small. We note that the number of firms does not necessarily track the number of licensees. We estimate that virtually all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

17. *Open Video Systems.* The open video system ("OVS") framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.[72] The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,[73] OVS falls within the SBA small business size standard covering cable services, which is "Wired Telecommunications Carriers."[74] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. Census data for 2007 shows that there were 31,996 establishments that operated that year.[75] Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.[76] Therefore, under this size standard, the majority of such businesses can be considered small. In addition, we note that the Commission has certified some OVS operators, with some now providing service.[77] Broadband service providers ("BSPs") are currently the only significant holders of OVS certifications or local OVS franchises.[78] The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, at least some of the OVS operators may qualify as small entities.

18. *Cable and Other Subscription Programming.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in operating studios and facilities

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[69] 13 C.F.R. § 121.201, NAICS code 517210.

[70] 13 C.F.R. § 121.201, NAICS code 517210 (2007 NAICS). The now-superseded, pre-2007 C.F.R. citations were 13 C.F.R. § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

[71] U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.

[72] 47 U.S.C. § 571(a)(3)-(4). *See 13th Annual Report*, 24 FCC Rcd at 606, ¶ 135.

[73] *See* 47 U.S.C. § 573.

[74] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers"; http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[75] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.

[76] *Id*.

[77] A list of OVS certifications may be found at http://www.fcc.gov/mb/ovs/csovscer.html.

[78] *See 13th Annual Report*, 24 FCC Rcd at 606-07, ¶ 135. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

for the broadcasting of programs on a subscription or fee basis . . . . These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers."[79] The SBA has developed a small business size standard for this category, which is: all such businesses having $35.5 million dollars or less in annual revenues.[80] Census data for 2007 show that there were 659 establishments that operated that year.[81] Of that number, 462 operated with annual revenues of less than $10 million and 197 operated with annual revenues of between $10 million and $100 million or more.[82] Thus, under this size standard, the majority of such businesses can be considered small entities.

19. *Small Incumbent Local Exchange Carriers*. We have included small incumbent local exchange carriers in this present RFA analysis. A "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[83] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope.[84] We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

20. *Incumbent Local Exchange Carriers ("ILECs")*. Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[85] Census data for 2007 shows that there were 31,996 establishments that operated that year.[86] Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.[87] Therefore, under this size standard, the majority of such businesses can be considered small entities.

21. *Competitive Local Exchange Carriers, Competitive Access Providers (CAPs), "Shared-Tenant Service Providers," and "Other Local Service Providers."* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size

[79] U.S. Census Bureau, 2007 NAICS Definitions, "515210 Cable and Other Subscription Programming"; http://www.census.gov/naics/2007/def/ND515210.HTM#N515210.

[80] 13 C.F.R. § 121.210; 2012 NAICS code 515210.

[81] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.

[82] *Id.*

[83] 15 U.S.C. § 632.

[84] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small-business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. *See* 13 C.F.R. § 121.102(b).

[85] 13 C.F.R. § 121.201 (2007 NAICS code 517110).

[86] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.

[87] *Id.*

standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[88] Census data for 2007 shows that there were 31,996 establishments that operated that year.[89] Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.[90] Therefore, under this size standard, the majority of such businesses can be considered small entities.

22. *Television Broadcasting*. The SBA defines a television broadcasting station as a small business if such station has no more than $35.5 million in annual receipts.[91] Business concerns included in this industry are those "primarily engaged in broadcasting images together with sound."[92] The 2007 U.S. Census indicates that 2,076 television stations operated in that year. Of that number, 1,515 had annual receipts of $10,000,000 dollars or less, and 561 had annual receipts of more than $10,000,000. Since the Census has no additional classifications on the basis of which to identify the number of stations whose receipts exceeded $35.5 million in that year, the Commission concludes that the majority of television stations were small under the applicable SBA size standard.

23. Apart from the U.S. Census, the Commission has estimated the number of licensed commercial television stations to be 1,388.[93] In addition, according to Commission staff review of the BIA Advisory Services, LLC's *Media Access Pro Television* Database, as of March 28, 2012, about 950 of an estimated 1,300 commercial television stations (or approximately 73 percent) had revenues of $14 million or less.[94] We therefore estimate that the majority of commercial television broadcasters are small entities.

24. We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations[95] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to

[88] 13 C.F.R. § 121.201 (2007 NAICS code 517110).

[89] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.

[90] *Id*.

[91] *See* 13 C.F.R. § 121.201, 2012 NAICS code 515120.

[92] *Id*. This category description continues, "These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studios, from an affiliated network, or from external sources." Separate census categories pertain to businesses primarily engaged in producing programming. *See* Motion Picture and Video Production, NAICS code 512110; Motion Picture and Video Distribution, NAICS Code 512120; Teleproduction and Other Post-Production Services, NAICS Code 512191; and Other Motion Picture and Video Industries, NAICS Code 512199.

[93] *See*. *Broadcast Station Totals as of December 31, 2013*, Press Release (MB rel. Jan. 8, 2014) ("*Jan. 8, 2014 Broadcast Station Totals Press Release*"), https://www.fcc.gov/document/broadcast-station-totals-december-31-2013.

[94] We recognize that this total differs slightly from that contained in *Jan. 8, 2014 Broadcast Station Totals Press Release*; however, we are using BIA's estimate for purposes of this revenue comparison.

[95] "[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both." 13 C.F.R. § 121.103(a)(1).

which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent.

25. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 396.[96] These stations are non-profit, and therefore considered to be small entities.[97]

E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

26. *Reporting Requirements*. The *Order* does not adopt reporting requirements.

27. *Recordkeeping Requirements*. The *Order* does not adopt recordkeeping requirements.

28. *Compliance Requirements*. Under the joint negotiation ban, a Top Four station will be prohibited from negotiating jointly with another Top Four station that is not commonly owned and that serves the same market.

F. Steps Taken to Minimize Economic Impact on Small Entities and Significant Alternatives Considered

29. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[98] The IRFA invited comment on issues that had the potential to have a significant impact on some small entities.[99]

30. In the *NPRM*, we sought comment on any potential alternatives we should consider to our proposals that would minimize any adverse impact on small entities while maintaining the benefits of our proposals.[100] Our goal in the *Order* is for the joint negotiation ban to facilitate the fair and effective completion of retransmission consent negotiations. The joint negotiation rules will serve the public interest by promoting competition among Top Four broadcast stations for MVPD carriage of their signals and the associated retransmission consent revenues.

31. As required by the Regulatory Flexibility Act, we have considered alternatives to minimize the impact on small entities.[101] Some parties opposing a joint negotiation prohibition argued it would decrease efficiency and increase transaction costs, because non-commonly owned broadcast stations in the same market must conduct negotiations separately.[102] We note that since small MVPDs supported adoption of this ban, no further analysis of alternatives on their behalf is necessary.[103] With respect to small broadcasters, we have sought to limit the economic impact on such entities by applying

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[96] *See Jan. 8, 2014 Broadcast Station Totals Press Release*.

[97] *See generally* 5 U.S.C. §§ 601(4), (6).

[98] *Id.* § 603(a)(6).

[99] *IRFA*, 26 FCC Rcd at 2762, ¶ 27.

[100] *Id.* We received no proposed alternatives for small business pertaining to the changes adopted in the *Order*.

[101] 5 U.S.C. § 603(a)(6).

[102] *NPRM*, 26 FCC Rcd at 2731-32, ¶ 23; s*ee, e.g.,* Belo Comments at 23; CBS Affiliates Comments at 19; NAB Comments at 27; NBC Affiliates Comments at 18; Nexstar Comments at 20-22; Sinclair Comments at 23; Journal Reply at 4; NAB Reply at 47, 50-51.

[103] *Order* ¶ 10.

the prohibition on joint negotiation only to situations involving two or more separately owned Top Four stations in the same market.[104]

G. Report to Congress

32. The Commission will send a copy of the *Order*, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.[105] In addition, the Commission will send a copy of the *Order*, including this FRFA, to the Chief Counsel for Advocacy of the SBA. The *Order* and FRFA (or summaries thereof) will also be published in the Federal Register.[106]

[104] *Order* ¶ 11.

[105] *See* 5 U.S.C. § 801(a)(1)(A).

[106] *See id*. § 604(b).

APPENDIX C

Initial Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA")[1] the Commission has prepared this present Initial Regulatory Flexibility Analysis ("IRFA") concerning the possible significant economic impact on small entities by the policies and rules proposed in this Further Notice of Proposed Rulemaking ("*FNPRM*"). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided on the first page of the *FNPRM*. The Commission will send a copy of the *FNPRM,* including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").[2] In addition, the *FNPRM* and IRFA (or summaries thereof) will be published in the Federal Register.[3]

A. Need for, and Objectives of, the Proposed Rule Changes

2. The *FNPRM* seeks comment on whether the Commission should eliminate or modify the network non-duplication and syndicated exclusivity rules (collectively, "exclusivity rules") for cable systems, satellite carriers, and open video systems. The network non-duplication rules permit a station with exclusive rights to network programming to assert those contractual rights, using notification procedures set forth in the Commission's rules, to prohibit a multi-channel video programming distributor ("MVPD") from carrying within a specified geographic zone the same network programming as broadcast by any other station.[4] Similarly, under the syndicated exclusivity rules, a station may assert its contractual rights to exclusivity within a specified geographic zone to prevent an MVPD from carrying the same syndicated programming aired by another station.[5]

3. Petitions for rulemaking filed in 2005 and in 2010 raised questions about the continued need for the exclusivity rules.[6] The *NPRM* in this proceeding sought comment on the potential benefits and harms of eliminating the exclusivity rules.[7] While the Commission received numerous comments on this issue, the record in this proceeding to date does not provide a sufficient basis on which to make a determination as to whether the exclusivity rules are still needed today and to assess the potential impact on affected parties of eliminating these rules. Accordingly, we have concluded that is necessary and appropriate to issue a *FNPRM* to undertake a more comprehensive review of the exclusivity rules and to compile a more complete record.

4. The *FNPRM* requests comment on whether the exclusivity rules are still needed to protect broadcasters' ability to compete in the video marketplace.[8] In particular, the *FNPRM* seeks comment on the extent to which local broadcast stations' audiences would likely be diverted to distant stations carried on MVPDs if the exclusivity rules were eliminated; the argument that MVPDs are unlikely to seek to import a distant station's signal today unless they are faced with the blackout of a local

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[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *See* 5 U.S.C. § 603(a).

[3] *See id*.

[4] *See* 47 C.F.R. §§ 76.92-94.

[5] *See* 47 C.F.R. § 76.101 *et seq.*

[6] *See* Time Warner Cable Inc. *et al.* Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent, MB Docket No. 10-71, at 1 (filed Mar. 9, 2010); American Cable Association, Petition for Rulemaking to Amend 47 C.F.R. §§ 76.64, 76.93 and 76.103 (filed Mar. 2, 2005) ("ACA 2005 Petition").

[7] *NPRM*, 26 FCC Rcd at 2740-43, ¶¶ 42-45.

[8] *See FNPRM* at ¶¶ 58-60.

station as a result of a retransmission dispute and that any such importation would likely be limited in duration; the likely impact that any diversion of a local station's audience to a distant station would have on the local station's advertising revenues and the extent to which changes in the sources of local station revenues may impact the need for retaining the exclusivity rules; and concerns that an MVPD's duplication of local programming via the signals of distant stations was not a fair method of competition with broadcasters are still valid today, given that MVPDs now do compete with broadcasters for access to programming.[9] The *FNPRM* also invites comment on the extent to which the exclusivity rules are still needed to provide incentives for program suppliers to produce syndicated and network programming and promote program diversity.[10]

5. The *FNPRM* seeks comment on the impact of eliminating the exclusivity rules on all interested parties, including broadcasters, MVPDs, program suppliers, and consumers.[11] The *FNPRM* seeks comment on the impact of eliminating the exclusivity rules on retransmission consent negotiations.[12] Additionally, the *FNPRM* invites comment on how elimination of the exclusivity rules would affect existing exclusivity contracts and broadcasters' ability to enforce those contracts.[13] Upon elimination of the exclusivity rules, broadcasters and networks or syndicated program suppliers would continue to determine the exclusivity terms of affiliation and syndicated programming agreements through free market negotiations, but without a Commission enforcement mechanism. Instead, parties seeking to enforce contractual exclusivity provisions would need to seek recourse from the courts. The *FNPRM* seeks comment on the costs and difficulty of pursuing judicial enforcement of exclusive arrangements.[14] Further, the *FNPRM* asks whether, if we eliminate the exclusivity rules, it would be necessary or appropriate to grandfather existing exclusivity contracts to ensure that such contracts are enforceable by the Commission for a period of time sufficient to allow existing contracts to be reformed, if the parties wish to retain the exclusivity provisions.[15] To the extent that we grandfather existing exclusivity contracts, the *FNPRM* invites comment on what would be a reasonable period of time to accord such contracts grandfathered status and whether we should allow a period of time for renegotiation of contracts before repeal of the rules takes effect.[16]

6. The *FNPRM* seeks comment on whether and how the Commission's analysis of the impact of eliminating the exclusivity rules should differ for any subset of the affected parties, such as small market stations.[17] The *FNPRM* asks whether, if the Commission decides to eliminate the exclusivity rules, these rules be retained, either permanently or for some period of time, for a class of smaller market stations.[18] If so, the *FNPRM* seeks comment on how we should define that class and for what period of time we should retain the rules.[19] The *FNPRM* also asks whether the existing exemptions from of certain small MVPDs from the exclusivity rules should be retained if we decide to retain the

[9] *See id.*

[10] *See id.* at ¶¶ 61-62.

[11] *See id.* at ¶¶ 64-71.

[12] *See id.* at ¶ 65.

[13] *See id.* at ¶ 66.

[14] *See id.*

[15] *See id.* at ¶ 68.

[16] *See id.*

[17] *See id.* at ¶ 69.

[18] *See id.*

[19] *See id.*

exclusivity rules.[20] In addition, the *FNPRM* requests comment on the impact of eliminating the exclusivity rules on localism.[21]

7. Finally, the *FNPRM* seeks comment on whether, as an alternative to elimination of the exclusivity rules, the Commission should make modifications to the rules.[22] Specifically, the *FNPRM* invites comment on whether the Commission should (1) extend the Grade B service contour exception for syndicated exclusivity to the network non-duplication rules; (2) modify the network non-duplication and syndicated exclusivity rules to apply only where the local station has granted retransmission consent to, and is carried by, the MVPD; or (3) modify the exclusivity rules in light of the Middle Class Tax Relief and Job Creation Act of 2012, which provides full power and Class A television stations an opportunity to relinquish their existing channels by auction in order to channel share with another television licensee.[23]

B. Legal Basis

8. The proposed action is authorized pursuant to Sections 4(i), 4(j), 301, 303(r), 307, 339, 340, and 653 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 301, 303(r), 307, 339, 340, and 573.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

9. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[24] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[25] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[26] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[27] Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

10. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers, which was developed for small wireline businesses. This category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a

[20] *See id.* The exclusivity rules for cable and OVS exempt systems serving fewer than 1,000 subscribers. *See* 47 C.F.R. §§ 76.95(a), 76.106(b), 76.1508(d), 76.1509. Similarly, the satellite exclusivity rules exempt areas in which the satellite carrier has fewer than 1,000 subscribers in a protected zone. *See id.* §§ 76.122(l), 76.123(m).

[21] *See FNPRM* at ¶ 70.

[22] *See id.* at ¶ 73.

[23] *See id.*

[24] 5 U.S.C. § 603(b)(3).

[25] 5 U.S.C. § 601(6).

[26] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

[27] 15 U.S.C. § 632.

combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services."[28] The SBA has developed a small business size standard for this category, which is: all such businesses having 1,500 or fewer employees.[29] Census data for 2007 shows that there were 31,996 establishments that operated that year.[30] Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.[31] Therefore, under this size standard, we estimate that the majority of such businesses can be considered small entities.

11. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide.[32] Industry data shows that there were 1,100 cable companies at the end of December 2012.[33] Of this total, all but ten cable operators nationwide are small under this size standard.[34] In addition, under the Commission's rate regulation rules, a "small system" is a cable system serving 15,000 or fewer subscribers.[35] Current Commission records show 4,945 cable systems nationwide.[36] Of this total, 4,380 cable systems have less than 20,000

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[28] U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers" (partial definition), at http://www.census.gov/cgi-bin/sssd/naics/naicsrch. Examples of this category are: broadband Internet service providers (*e.g.*, cable, DSL); local telephone carriers (wired); cable television distribution services; long-distance telephone carriers (wired); closed circuit television (CCTV) services; VoIP service providers, using own operated wired telecommunications infrastructure; direct-to-home satellite system (DTH) services; telecommunications carriers (wired); satellite television distribution systems; and multichannel multipoint distribution services (MMDS).

[29] 13 C.F.R. § 121.201; 2012 NAICS code 517110.

[30] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.

[31] *Id*.

[32] 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of $100 million or less in annual revenues. *Implementation of Sections of the Cable Television Consumer Protection And Competition Act of 1992: Rate Regulation,* MM Docket No. 92-266, MM Docket No. 93-215*,* Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408, ¶ 28 (1995).

[33] NCTA, Industry Data, Number of Cable Operating Companies (December 2012), http://www.ncta.com/Statistics.aspx (visited Feb. 21, 2014). Depending upon the number of homes and the size of the geographic area served, cable operators use one or more cable systems to provide video service. *See Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming,* MB Docket No. 12-203, Fifteenth Report, 28 FCC Rcd 10496, 10505-6, ¶ 24 (2013) ("*15th Annual Competition Report*").

[34] *See* SNL Kagan, "Top Cable MSOs – 09/13 Q"; available at http://www.snl.com/InteractiveX/TopCableMSOs.aspx?period=2013Q3&sortcol=subscribersbasic&sortorder=desc. We note that, when applied to an MVPD operator, under this size standard (*i.e.*, 400,000 or fewer subscribers) all but 14 MVPD operators would be considered small. *See* NCTA, Industry Data, Top 25 Multichannel Video Service Customers (2012), http://www.ncta.com/industry-data (visited Feb. 21, 2014). The Commission applied this size standard to MVPD operators in its implementation of the CALM Act. *See Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, MB Docket No. 11-93, Report and Order, 26 FCC Rcd 17222, 17245-46, ¶ 37 (2011) ("*CALM Act Report and Order*") (defining a smaller MVPD operator as one serving 400,000 or fewer subscribers nationwide, as of December 31, 2011).

[35] 47 C.F.R. § 76.901(c).

[36] The number of active, registered cable systems comes from the Commission's Cable Operations and Licensing System (COALS) database on Aug. 28, 2013. A cable system is a physical system integrated to a principal headend.

subscribers, and 565 systems have 20,000 or more subscribers, based on the same records. Thus, under this standard, we estimate that most cable systems are small entities.

12. *Cable System Operators (Telecom Act Standard)*. The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[37] There are approximately 56.4 million incumbent cable video subscribers in the United States today.[38] Accordingly, an operator serving fewer than 564,000 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[39] Based on available data, we find that all but ten incumbent cable operators are small entities under this size standard.[40] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million.[41] Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

13. *Television Broadcasting*. This Economic Census category "comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public."[42] The SBA has created the following small business size standard for such businesses: those having $35.5 million or less in annual receipts.[43] The 2007 U.S. Census indicates that 2,076 television stations operated in that year. Of that number, 1,515 had annual receipts of $10,000,000 dollars or less, and 561 had annual receipts of more than $10,000,000. Since the Census has no additional classifications on the basis of which to identify the number of stations whose receipts exceeded $35.5 million in that year, the Commission concludes that the majority of television stations were small under the applicable SBA size standard.

14. Apart from the U.S. Census, the Commission has estimated the number of licensed commercial television stations to be 1,388.[44] In addition, according to Commission staff review of the BIA Advisory Services, LLC's *Media Access Pro Television Database* on March 28, 2012, about 950 of an estimated 1,300 commercial television stations (or approximately 73 percent) had revenues of $14

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[37] 47 U.S.C. § 543(m)(2); *see* 47 C.F.R. § 76.901(f) & nn. 1-3.

[38] *See* NCTA, Industry Data, Cable Video Customers (2012), http://www.ncta.com/industry-data (visited Feb. 21, 2014).

[39] 47 C.F.R. § 76.901(f); *see FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (Cable Services Bureau 2001).

[40] *See* NCTA, Industry Data, Top 25 Multichannel Video Service Customers (2012), http://www.ncta.com/industry-data (visited Feb. 21, 2014).

[41] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. *See* 47 C.F.R. § 76.901(f).

[42] U.S. Census Bureau, 2012 NAICS Definitions, "515120 Television Broadcasting," at http://www.census.gov./cgi-bin/sssd/naics/naicsrch.

[43] 13 C.F.R. § 121.201; 2012 NAICS code 515120.

[44] *See Broadcast Station Totals as of December 31, 2013*, Press Release (MB rel. Jan. 8, 2014) ("*Jan. 8, 2014 Broadcast Station Totals Press Release*"), https://www.fcc.gov/document/broadcast-station-totals-december-31-2013.

million or less.[45] We therefore estimate that the majority of commercial television broadcasters are small entities.

15. We note, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations[46] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive to that extent.

16. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 396.[47] These stations are non-profit, and therefore considered to be small entities.[48]

17. *Direct Broadcast Satellite (DBS) Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic "dish" antenna at the subscriber's location. DBS, by exception, is now included in the SBA's broad economic census category, Wired Telecommunications Carriers,[49] which was developed for small wireline businesses. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.[50] Census data for 2007 shows that there were 31,996 establishments that operated that year.[51] Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.[52] Therefore, under this size standard, the majority of such businesses can be considered small entities. However, the data we have available as a basis for estimating the number of such small entities were gathered under a superseded SBA small business size standard formerly titled "Cable and Other Program Distribution." The definition of Cable and Other Program Distribution provided that a

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[45] We recognize that BIA's estimate differs slightly from the FCC total given *supra*.

[46] "[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both." 13 C.F.R. § 21.103(a)(1).

[47] *See Jan. 8, 2014 Broadcast Station Totals Press Release*.

[48] *See generally* 5 U.S.C. §§ 601(4), (6).

[49] *See* 13 C.F.R. § 121.201, 2012 NAICS code 517110. This category of Wired Telecommunications Carriers is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. *By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.*" (*Emphasis* added to text relevant to satellite services.) U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers," at http://www.census.gov/cgi-bin/sssd/naics/naicsrch.

[50] 13 C.F.R. § 121.201; 2012 NAICS code 517110.

[51] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.

[52] *Id*.

small entity is one with $12.5 million or less in annual receipts.[53] Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and DISH Network.[54] Each currently offer subscription services. DIRECTV and DISH Network each report annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined under the superseded SBA size standard would have the financial wherewithal to become a DBS service provider.

18. *Satellite Master Antenna Television (SMATV) Systems, also known as Private Cable Operators (PCOs)*. SMATV systems or PCOs are video distribution facilities that use closed transmission paths without using any public right-of-way. They acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. SMATV systems or PCOs are now included in the SBA's broad economic census category, Wired Telecommunications Carriers,[55] which was developed for small wireline businesses. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.[56] Census data for 2007 show that there were 31,996 establishments that operated that year.[57] Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.[58] Therefore, under this size standard, the majority of such businesses can be considered small entities.

19. *Home Satellite Dish (HSD) Service.* HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Wired Telecommunications Carriers.[59] The SBA has developed a small business size standard for this category, which is: all such businesses having 1,500 or fewer employees.[60] Census data for 2007 show that there were 31,996 establishments that operated that year.[61] Of this total, 30,178 establishments had fewer than 100 employees, and 1,818

[53] *See* 13 C.F.R. § 121.201, NAICS code 517510 (2002).

[54] See *15th Annual Competition Report*, 28 FCC Rcd at 10507, ¶ 27. As of June 2012, DIRECTV is the largest DBS operator and the second largest MVPD in the United States, serving approximately 19.9 million subscribers. DISH Network is the second largest DBS operator and the third largest MVPD, serving approximately 14.1 million subscribers. *Id*. at 10507, 10546, ¶¶ 27, 110-11.

[55] 13 C.F.R. § 121.201; 2012 NAICS code 517110.

[56] *See id*.

[57] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.

[58] *Id*.

[59] 13 C.F.R. § 121.201; 2012 NAICS code 517110.

[60] *See id*.

[61] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.

establishments had 100 or more employees.[62] Therefore, under this size standard, the majority of such businesses can be considered small entities.

20. *Open Video Systems.* The open video system (OVS) framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.[63] The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,[64] OVS falls within the SBA small business size standard covering cable services, which is "Wired Telecommunications Carriers."[65] The SBA has developed a small business size standard for this category, which is: all such businesses having 1,500 or fewer employees.[66] Census data for 2007 shows that there were 31,996 establishments that operated that year.[67] Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.[68] Therefore, under this size standard, we estimate that the majority of these businesses can be considered small entities. In addition, we note that the Commission has certified some OVS operators, with some now providing service.[69] Broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises.[70] The Commission does not have financial or employment information regarding the other entities authorized to provide OVS, some of which may not yet be operational. Thus, again, at least some of the OVS operators may qualify as small entities.

21. *Cable and Other Subscription Programming.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis. . . . These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers."[71] The SBA has developed a small business size standard for this category,

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[62] *Id.*

[63] 47 U.S.C. § 571(a)(3)-(4); *see Implementation of Section 19 of the 1992 Cable Act and Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 06-189, Thirteenth Report, 24 FCC Rcd 542, 606, ¶ 135 (2009) ("*13th Annual Competition Report*").

[64] *See* 47 U.S.C. § 573.

[65] *See* 13 C.F.R. § 121.201, 2012 NAICS code 517110. This category of Wired Telecommunications Carriers is defined in part as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services." U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers," at http://www.census.gov/cgi-bin/sssd/naics/naicsrch.

[66] 13 C.F.R. § 121.201; 2012 NAICS code 517110.

[67] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.

[68] *Id.*

[69] A list of OVS certifications may be found at http://www.fcc.gov/mb/ovs/csovscer.html.

[70] *See 13th Annual Competition Report*, 24 FCC Rcd at 606-07, ¶ 135. BSPs are newer businesses that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

[71] U.S. Census Bureau, 2012 NAICS Definitions, "515210 Cable and Other Subscription Programming," at http://www.census.gov/cgi-bin/sssd/naics/naicsrch.

which is: all such businesses having $35.5 million dollars or less in annual revenues.[72] Census data for 2007 show that there were 659 establishments that operated that year.[73] Of that number, 462 operated with annual revenues of $9,999,999 dollars or less.[74] One hundred ninety-seven (197) operated with annual revenues of between $10 million and $100 million or more.[75] Thus, under this size standard, the majority of such businesses can be considered small entities.

22. *Motion Picture and Video Production.* These entities may be indirectly affected by our action. The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in producing, or producing and distributing motion pictures, videos, television programs, or television commercials."[76] We note that establishments in this category may be engaged in various industries, including cable programming. The SBA has developed a small business size standard for this category, which is: all such businesses having $30 million dollars or less in annual revenues.[77] Census data for 2007 show that there were 9,478 establishments that that operated that year.[78] Of that number, 9,128 had annual receipts of$24,999,999 or less, and 350 had annual receipts ranging from not less than $25,000,000 to $100,000,000 or more.[79] Thus, under this size standard, the majority of such businesses can be considered small entities.

23. *Motion Picture and Video Distribution*. The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in acquiring distribution rights and distributing film and video productions to motion picture theaters, television networks and stations, and exhibitors."[80] We note that establishments in this category may be engaged in various industries, including cable programming. The SBA has developed a small business size standard for this category, which is: all such businesses having $29.5 million dollars or less in annual revenues.[81] Census data for 2007 show that there were 477 establishments that operated that year.[82] Of that number, 448 had annual receipts of$24,999,999 or less, and 29 had annual receipts ranging from not less than $25,000,000 to

[72] 13 C.F.R. § 121.201; 2012 NAICS code 515210.

[73] *See* U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Receipts Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 515210, Table EC0751SSSZ2; available at http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.

[74] *Id*.

[75] *Id*.

[76] U.S. Census Bureau, 2012 NAICS Definitions, NAICS Code 512110, at http://www.census.gov/cgi-bin/sssd/naics/naicsrch.

[77] 13 C.F.R § 121.201, 2012 NAICS code 512110.

[78] *See* U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Receipts Size of Firms for the United States: 2007 – 2007 Economic Census," NAICS code 512110, Table EC0751SSSZ4; available at http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.

[79] *See id*.

[80] U.S. Census Bureau, 2012 NAICS Definitions, NAICS Code 512120, at http://www.census.gov/cgi-bin/sssd/naics/naicsrch.

[81] 13 C.F.R. § 121.201, 2012 NAICS code 512120.

[82] *See* U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Receipts Size of Firms for the United States: 2007 – 2007 Economic Census," NAICS code 512120, Table EC0751SSSZ4; available at http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.

$100,000,000 or more.[83] Thus, under this size standard, the majority of such businesses can be considered small entities.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

24. The *FNPRM* does not propose any recordkeeping requirements. The *FNPRM* seeks comment on whether the Commission should eliminate the network non-duplication and syndicated exclusivity rules. If the Commission eliminates the exclusivity rules, broadcasters and networks or syndicated program suppliers would continue to determine the exclusivity terms of affiliation and syndicated programming agreements through free market negotiations, but there would be no Commission enforcement mechanism for such exclusivity provisions. Instead, parties seeking to enforce contractual exclusivity provisions would need to seek recourse from the courts.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

25. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[84]

26. The *FNPRM* seeks comment on whether, if we eliminate the exclusivity rules, it would be necessary or appropriate to grandfather existing exclusivity contracts to ensure that such contracts are enforceable by the Commission for a period of time sufficient to allow existing contracts to be reformed, if the parties wish to retain the exclusivity provisions.[85] To the extent that the Commission grandfathers existing exclusivity contracts, the *FNPRM* asks what would be a reasonable period of time to accord such contracts grandfathered status and whether the Commission should allow a period of time for renegotiation of contracts before repeal of the rule takes effect.[86] Such grandfathering might reduce any adverse economic impact of eliminating the exclusivity rules on broadcast stations, including small broadcast stations.

27. The *FNPRM* also asks whether, if the Commission decides to eliminate the exclusivity rules, the rules should be retained, either permanently or for some period of time, for a class of smaller market broadcast stations.[87] If so, the *FNPRM* seeks input on how we should define that class and for what period of time should we retain the exclusivity rules.[88] Retaining the exclusivity rules permanently or for some period of time for small broadcast stations might reduce any adverse economic impact of eliminating the exclusivity rules on small broadcast stations.

28. Further, the *FNPRM* notes that the exclusivity rules currently exempt certain small MVPDs and asks whether those exemptions should be retained if the Commission decides to retain the

[83] *See id.*

[84] 5 U.S.C. § 603(c)(1)-(c)(4)

[85] *See FNPRM* at ¶ 68.

[86] *See id.*

[87] *See id.* at ¶ 69

[88] *See id.*

exclusivity rules.[89] Retaining the existing exemption for small MVPDs might be appropriate to avoid any adverse economic impact on small MVPDs if the exclusivity rules are retained.

F. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rule

None.

[89] *See id.* The exclusivity rules for cable and OVS exempt systems serving fewer than 1,000 subscribers. *See* 47 C.F.R. §§ 76.95(a), 76.106(b), 76.1508(d), 76.1509. Similarly, the satellite exclusivity rules exempt areas in which the satellite carrier has fewer than 1,000 subscribers in a protected zone. *See id.* §§ 76.122(l), 76.123(m).

STATEMENT OF
CHAIRMAN TOM WHEELER

Re: *Amendment of the Commission's Rules Related to Retransmission Consent,* MB Docket No. 10-71

Congress created the retransmission consent regime over 20 years ago. Since that time, we have witnessed significant changes in the marketplace and been able to observe how the parties have operated in the process. The actions we take respond to what we have learned and facilitate the fair and effective completion of retransmission consent negotiations, to the ultimate benefit of consumers.

Congress intended that retransmission consent agreements be negotiated by parties one-on-one. Increasingly, though, stations in local markets have banded together to negotiate for retransmission consent fees, even though they otherwise would compete against each other for those fees.

Joint negotiations by the largest stations were shown in one study to raise prices to cable systems by around 20 to 40%. This puts upward pressure on the prices paid by consumers of subscription video services.

The action we take to address joint negotiation by broadcasters will return retransmission consent to one-on-one negotiations as Congress intended, rather than many against one. This should benefit the consumer by removing the leverage of collusion to inappropriately drive up retransmission fees and with them consumer prices.

The actions we take regarding joint negotiation are supported by basic economic principles and antitrust law.

In light of the changes in the video marketplace since we adopted our network non-duplication and syndicated exclusivity rules, it is time for the Commission to undertake a comprehensive review of those exclusivity rules. We need to determine whether these rules are still needed as a Commission mechanism for enforcing the private exclusivity agreements entered into between broadcasters and providers of programming.

Thank you to the Media Bureau for their work on this item.

STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN

Re: *Amendment of the Commission's Rules Related to Retransmission Consent,* MB Docket No. 10-71

I am pleased to support the Chairman on this Order, addressing the issue of joint retransmission negotiations.

In 2011, the average bill for paid television was $86 per month. By 2015, the same average is expected to reach $123, reflecting an annual retail rate increase of about 6%. While consumer income and spending have remained relatively flat, and the inflation rate has risen only by 1.5%, cable companies claim programming costs are increasing by 10% per year – mostly due to retransmission consent negotiations.[1]

Although the amendments to the Act in 1992 gave broadcasters the ability to charge fees for content that is free over the airwaves, Section 325 states that broadcasters are prohibited from "failing to negotiate [retransmission consent] in good faith."

Many of the larger broadcast companies already own stations in a number of markets that do not compete with each other, and have more leverage to negotiate large retransmission fees. But when it comes to Top Four stations, separately owned, within the same market – essentially competitors – joint negotiation may violate the "good faith" clause.

When top broadcasters in the same market negotiate higher prices – or threaten to pull the plug – MVPDs, both large and small, basically have no choice. And where do those extra fees come from--the consumer's pocket?

As for the FNPRM on the non-duplication rule, I look forward to a full record on this issue, but believe in upholding the rule because it promotes competition and localism.

I appreciate the good work of the Media Bureau, the Office of General Counsel, the Chairman's office, and my staff on this item.

[1] http://www.forbes.com/sites/amadoudiallo/2013/10/14/cable-tv-price-hikes-unsustainable/

STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL

Re: *Amendment of the Commission's Rules Related to Retransmission Consent,* MB Docket No. 10-71

Few Americans have heard of the term "retransmission consent." It is one of those wonky and lawyerly things we bandy about in these halls and in this town. Fewer still know that more than two decades ago Congress prohibited retransmitting a broadcast television station's signal without the station's consent—and at the same time directed parties negotiating for this consent to do so in "good faith."

But far too many Americans know what happens when retransmission consent negotiations go wrong.

First, it is pretty clear to consumers that something is not right when they turn on the television for the news, their favorite show, or the game, and instead get saddled with a dark screen. They may not know how and why retransmission consent negotiations between broadcasters and their cable or satellite company have failed, but they know a blackout means they are not getting the programming they paid for. When this happens, I think they are owed a refund.

Second, it is pretty clear to consumers that what they pay for television programming packages goes up too far too fast. I am under no illusion that retransmission consent is the main driver of increased programming costs. But it is a piece of a larger system that deserves attention.

So it is for these two reasons—the incidence of extended blackouts and the creep upward of rates—that I support today's action. By limiting joint negotiations by local broadcasters, I am hopeful we can reduce the extent of retransmission consent blackouts. I am also hopeful we can help keep consumer rates more level. Because the record reflects that when stations jointly negotiate, retransmission consent fees are higher, and those higher charges get passed on to consumers. So I think our efforts today are a good development—not only because I am a regulator, but because I am a consumer who watches and pays bills, too.

STATEMENT OF
COMMISSIONER AJIT PAI

Re: *Amendment of the Commission's Rules Related to Retransmission Consent,* MB Docket No. 10-71

When it comes to retransmission consent negotiations, I take counsel from two wise communications experts—Rob Base & DJ E-Z Rock—whose hit song reminds us, "It takes two to make a thing go right."[1] After carefully reviewing the record and meeting with numerous parties to this proceeding, I have concluded that good-faith retransmission-consent negotiations generally involve two parties: one multichannel video programming distributor (MVPD) and one broadcast company. Adding a third or fourth party to the mix raises troubling competitive concerns.

Accordingly, I am pleased to support today's item. The order states that the joint negotiation of retransmission consent agreements by separately-owned, top-four stations in the same market violates the statutory duty to negotiate in good faith.

To be sure, such joint negotiations may bring some benefits. But given that retransmission consent negotiations usually occur only once every three years, the cost savings are at best intermittent and do not compare with the efficiencies produced by television stations sharing sales staff or other backroom operations.

And in my judgment, the harms outweigh any such benefits. The record indicates that joint negotiations may result in supra-competitive increases in retransmission-consent fees.[2] This suggests that such conduct is collusive and could be a "contract, combination . . . or conspiracy, in restraint of trade" that is prohibited by the Sherman Act.[3] The anti-competitive potential of joint negotiations here is only amplified by the regulatory context for video carriage, including the compulsory copyright license, network non-duplication rule, and syndicated exclusivity rule.

Also crucial to my vote is that the Commission today carefully remains within its limited authority over retransmission consent. Section 325(b)(3)(C) of the Communications Act instructs the FCC to enact regulations to prohibit a television broadcast station or MVPD from "failing to negotiate in good faith." This provision allows the Commission to proscribe certain negotiating tactics in order to ensure good faith negotiations between broadcast stations and MVPDs, such as refusing to respond to a retransmission consent proposal.[4] But it does not give the Commission the power to mandate the substantive outcome of retransmission consent negotiations. This will remain the case after today's vote.

I appreciate my colleagues' willingness to incorporate many of my suggestions into the item. In particular, I am pleased that today we are not extending the so-called "sweeps prohibition" to direct broadcast satellite providers. The record did not reveal a need for such regulation, and we should not impose new regulatory mandates where there is not a concrete problem to solve.

Finally, I support the Commission's decision to seek additional comment on whether we should eliminate or modify our network non-duplication and syndicated exclusivity rules. In particular, I encourage parties to focus their feedback on whether the interests these rules are designed to advance can

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[1] Rob Base & DJ E-Z Rock, *It Takes Two* (It Takes Two, 1988).

[2] *See* Order at para. 16.

[3] *See* 15 U.S.C. § 1.

[4] *See* 47 C.F.R. § 76.65(b)(1)(v).

and should be protected through private contractual arrangements or whether the compulsory copyright license would render such a scheme unworkable.

Many thanks to the Media Bureau for its efforts. It took more than two to make this item outta sight, so I particularly want to recognize Raelynn Remy, Diana Sokolow, Kathy Berthot, Michelle Carey, Nancy Murphy, Mary Beth Murphy, and Steven Broeckaert. For this recovering antitrust lawyer and staffer on the 2007 *MDU Order*,[5] the item truly was a pleasure to read.

[5] *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235 (2007), *aff'd, National Cable & Telecommunications Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009).

STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY

Re: *Amendment of the Commission's Rules Related to Retransmission Consent,* MB Docket No. 10-71

This item seeks to improve the retransmission consent process between television broadcasters and MVPDs. The order acts upon evidence in the record that joint negotiations between two top-four, non-commonly owned broadcast stations in a market raises consent fees above market rates. It, therefore, adds such activity to the list in our rules of *per se* "good faith" violations.

While I find the record somewhat thin, and I may not have gone in the same direction if I had the pen, the order aims to shield consumers from unreasonable price increases and I am willing to support it. I do so with the reservation that while we have legal authority to act, this order partially relies upon one provision that is unnecessary.

Similarly, I support the further notice, but will keep an open mind and do not subscribe at this time to any of the particular tentative conclusions or proposed legal authority. I am sympathetic to the argument that it may not be necessary for the Commission to continue enforcing network non-duplication and syndication exclusivity rules when these can be addressed through private contracts. These are complicated questions and I hope a full record from interested parties will help clarify the Commission's responsibility and consumer's best interests in this area.

Finally, this item is the result of a tremendous amount of hard work. I thank the Chairman, his excellent staff, and the Media Bureau for their time and willingness to incorporate some of my feedback.